89-553

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO. _____

ROBERT C. GUCCIONE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the intentional tort exception to the Federal Tort Claims Act bars a claim for negligent supervision by a federal employee of a non-employee who commits an intentional tort.

II. Whether the intentional tort exception to the Federal Tort Claims Act bars claims for negligent supervision by a federal employee of a person whenever the intentional tort is "work-related."

III. Whether negligent supervision may provide the basis for liability under the Federal Tort Claims Act for a foreseeable intentional tort by a government employee.

IV. Whether a claim for negligent supervision by federal employees is not actionable under the Federal Tort Claim Act because

federal supervisory personnel owe no duty of care to persons who may be injured by their supervisees.

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STATUTES INVOLVED

28 U.S.C. §1346(b) (1982) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2680(h) (1982) provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to --
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

OPINIONS BELOW

The decision of the district court is reported at 670 F.Supp. 527, and is reproduced in the appendix at A-22. The decision of the Court of Appeals for the Second Circuit dated May 26, 1988 is reported at 847 F.2d 1031, and is reproduced in the appendix at A-3. The opinion issued upon rehearing, dated June 9, 1989, is reported at 878 F.2d 33, and is reproduced in the appendix at A-19.

JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the Second Circuit was entered on May 26, 1988. The order denying the petition for rehearing and rehearing en banc was entered on July 6, 1989. (A-1)

The jurisdiction of this Court to review the judgment of the Court of Appeals for the Second Circuit is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

a. The Complaint

Robert C. Guccione ("Guccione") sued the United States under the Federal Tort Claims Act ("FTCA"). His complaint charged that the FBI had been negligent in its conduct of its covert ABSCAM investigation. Specifically, he charged that FBI agents' negligent supervision and other negligent conduct during ABSCAM permitted an FBI operative, Melvin Weinberg ("Weinberg"), to engage in a crusade to punish Petitioner for his refusal to engage in criminal activity. As part of this punishment, Weinberg sabotaged Petitioner's attempt to secure necessary financing for a casino and hotel project in Atlantic City, New Jersey, causing Petitioner substantial financial loss.

Weinberg was not an employee of the FBI, but the FBI used him as an undercover operative.[1] At the time the FBI knew that Weinberg had a history of involvement in fraudulent and illegal activities. Indeed, it was precisely because of that history that the FBI selected him to pose as an agent of Abdul Enterprises, a fictitious Arab investment company.

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[1]The Department of Justice's own guidelines on FBI use of Informants and Confidential Sources expressly state that "informants and confidential sources are not employees of the FBI." Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice to the United States Senate at 518 (1982) (hereinafter "Senate Report").

Indeed, in a prior lawsuit, the government vehemently argued that "it is clear [Weinberg] is not an employee of the FBI ..... [He] is clearly not an employee." (CAA.94-95) (References in the form "CAA" followed by a number refer to pages in the Appendix filed in the Court of Appeals; those in the form "A" followed by a number refer to pages in the Appendix to this Petition.)

While the FBI was conducting ABSCAM, Petitioner was constructing a casino in Atlantic City, New Jersey. Without any reasonable law enforcement justification, Weinberg targeted Petitioner as a victim of the ABSCAM sting operation. Apparently first in an effort to pressure Petitioner into committing illegal acts (including bribery of a state casino official) and, later, to "punish" him for refusing to do so, Weinberg undertook a campaign to sabotage Petitioner's attempts to secure financial backing for his casino project. As a direct result of Weinberg's activities, Petitioner was denied the necessary financial backing he needed. It was only after an exculpatory and explanatory Senate Report was published and disseminated to lenders that Petitioner learned why he had been unable to get the financing he had sought.

b. The Senate Report

While it was going on, the ABSCAM operation was shrouded in secrecy. After indictments were returned against those targets who did commit crimes, information relating to ABSCAM insofar as it involved those targets was made public. However, because Petitioner had resisted Weinberg's efforts, there was no indictment and no public disclosure of Weinberg's campaign against Petitioner until a Senate Report ["the Report"] which focused on the undercover operation was made public on December 15, 1982. That Report included a section which dealt exclusively with the investigation of Petitioner Guccione (CAA.129-36), and contained transcripts of conversations between Weinberg and others which had been tape recorded by the FBI.

The Report highlighted the particularly egregious conduct directed against Guccione during ABSCAM. It noted:

> Informant Melvin Weinberg's contacts with one individual in the course of ABSCAM were particularly sustained, overbearing, and unjustified by a prior reasonable suspicion. Because the individual, publisher and businessman Bob Guccione, resisted Weinberg's repeated inducements and pressure to become involved in a bribery conspiracy, the incident never became the direct object of a court's attention under either the entrapment doctrine or the "outrageous conduct" standard of the due process clause of the Fifth Amendment to the Constitution. Nevertheless, the Guccione events provide a chilling reminder of the risks imposed by lax procedures and inadequate supervision of an informant like Weinberg, by allowing him wide discretion in the targets he selects and in the scenarios with which he approaches those targets and by failing to replace him early in the undercover operation with an undercover special agent. (CAA.129)

The Senate Report disclosed for the first time that Weinberg had made false and defamatory remarks to others about Guccione. (CAA.130) It reported that Weinberg had told Guccione's business associates that Abdul Enterprises had investigated Guccione and had found problems with his financial position, his organized crime connections, and his ability to receive a casino license. These statements were defamatory. Similarly, the Senate Report noted:

> Telephone toll records and recorded tapes reveal that, in late March and early April 1979, Weinberg began speaking frequently with Torcasio [an employee of Penthouse Magazine, of which Guccione was publisher], Dinallo [president of Terminal Construction Corp.], and others, usually in order to make derogatory comments about Guccione. (CAA.131-32)

Despite Guccione's explicit refusals to participate in any illegal activity, Weinberg continued his campaign.[2] As the Report states:

> Weinberg followed his performance with an orchestrated plan to sabotage Guccione to induce him to commit a crime. He immediately telephoned Torcasio and Errichetti's [Mayor of Camden, New Jersey, convicted and imprisoned as a result of ABSCAM] secretary and misrepresented Guccione's statements at their meeting,

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[2]The Report quotes Guccione's response to Weinberg's efforts to induce him to commit bribery and his suggestion that Guccione was involved with organized crime:

> Guccione: No way Mel, let me, let me give you this. This is on the heads and the eyes of my children. I have five children, alright? On the eyes of my children, I am not connected with anybody. I am totally my own man. I am 100 percent owner of all of my companies, I owe nothing to nobody, nobody sits on my back, nobody has any pull with me. No one and least of all anybody like that, who is likely to cause me problems in getting licenses and that sort of thing. (CAA.132-33)

> maligned him, and attempted to injure his relationship to Torcasio. (CAA.133)

Finally, once Weinberg realized he could not induce Guccione to commit a crime, he graphically expressed his intention to punish Guccione:

> Weinberg suggested, "The best way to punish him [Guccione], he doesn't get the fucking place built -- that punishes more than anything else." ([Deleted]) (CAA.134)

He carried out that threat.

The Senate Report concluded:

> The unsuccessful pursuit and manipulation of Guccione by the undercover operatives provides a glaring example of the risks posed to innocent citizens by the government's reliance upon unsavory informants and dishonest middlemen, when they are given wide latitude to develop scenarios and select targets of their investigation. Because Guccione resisted all inducements and pressure to engage in criminal activity, no criminal prosecution of him resulted. Nevertheless, Guccione was the victim of undue interference by Weinberg

> in his business associations, unjustified manipulation of his business prospects, and unreasonable targeting. (CAA.135)

c. The Lawsuit

After the Department of Justice issued final denials of administrative claims filed by Guccione, pursuant to 28 U.S.C. §2675, on July 18, 1984 and November 28, 1984, Petitioner filed suit against the United States in the United States District Court for the Southern District of New York. The suit charged that the FBI employees who oversaw the ABSCAM operation were negligent in their handling of the matter. The United States undertook extensive and costly discovery of plaintiff; at the same time, it refused to comply with the Guccione's requests for relevant facts. Finally, on July 18, 1986, Petitioner moved for a default judgment based on the government's willful failure to comply

with the court's repeated discovery orders. The affidavit in support of the motion noted for example that, on the central issue in the case, "the negligent mismanagement by the FBI of certain operatives, most particularly Melvin Weinberg" "the government has not produced a single official FBI report, memorandum or record of internal communication between Weinberg and his control, FBI Special Agent John Good." (emphasis added)

Shortly after the sanction motion was referred by District Judge Constance Baker Motley to a magistrate, the United States moved to dismiss on the ground of sovereign immunity. Immediately after Petitioner submitted his papers in opposition to that motion, the United States filed a motion for summary judgment on the basis of the statute of limitations.

On July 6, 1987 the district court issued an order granting both of the government's motions. (CAA.571) Two months later it filed a written opinion explaining her ruling. (A-22)

In its opinion, the district court acknowledged that the question of whether Weinberg was an "employee" of the federal government, under the FTCA, raised a genuine issue of fact. (A-39-40). Nevertheless, the lower court entered judgment for the United States on the ground that the action was barred by sovereign immunity under the "intentional tort exception" to the FTCA, 28 U.S.C. §2680(h) (1982), and alternatively, that the action was time barred under the applicable two-year statute of limitations.

A panel of the Court of Appeals for the Second Circuit affirmed the decision on the sovereign immunity ground, withholding any

opinion on the propriety of the district court's dismissal pursuant to the statute of limitations. (A-3) In a dramatic departure from well-established precedent, the panel held that the employment status of the intentional tortfeasor was irrelevant to the determination of whether the intentional tort exception applied to a claim of negligence against the federal government. Rather, it held that the United States is not liable for the intentional torts of a non-employee who is carrying out the government's business even where the claimant alleges a claim of primary negligence on the part of the government employees in failing to supervise or otherwise avoid foreseeable risks.[3]

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[3]In addition, the panel rejected plaintiff's assertion that, by knowingly exposing him to an operative who had, on frequent occasions, expressed his intention to "destroy" and "punish" him, the government assumed an affirmative duty to protect the plaintiff from the effects of that operative's crusade.
(footnote continued)

On June 9, 1988, Petitioner filed a petition for rehearing and suggestion for rehearing en banc. Two weeks later, this Court rendered its decision in Sheridan v. United States, __ U.S. __, 108 S.Ct. 2449 (1988).

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> "The mere fact that Guccione was the subject of an undercover investigation by the FBI gave rise to no special 'affirmative duty' to protect Guccione independent of the government's duty to supervise its agents."

847 F.2d at 1037.

While acknowledging that such an independent duty exception is evolving in other circuits, the panel held that the exception did not apply where the government was carrying out its "basic function" -- presumably suggesting that this "basic function" was being furthered during the course of the operative's crusade. This assertion is directly at odds with the conclusions and criticisms documented in the Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice to the U.S. Senate, SA 159-162 (1982).

In Sheridan, suit was brought under the FTCA for injuries the complainant sustained when Carr, an intoxicated, off-duty serviceman, fired shots into an automobile. The plaintiff's claim was based upon alleged negligence of Navy corpsman in allowing the drunken serviceman to leave a Naval Hospital with a loaded rifle. Reversing the decision of the Court of Appeals, this Court held that the suit was not barred by the intentional tort exception. The Court reasoned that (regardless of that exception) the conduct of the off-duty serviceman would not have given rise to government liability and so would not have been within §1346(b)'s general waiver of sovereign immunity. The Court concluded that there was therefore no basis for applying the intentional tort exception to that waiver.

Petitioner brought the Sheridan decision to the attention of the panel and urged that that decision compelled recognition of his right to sue the United States for the acts alleged in his complaint.

On June 9, 1989, the panel issued an opinion rejecting that argument. (A-19) The panel wrote:

> Sheridan does not aid Guccione. His claim is based on the negligence of the United States in failing to supervise Melvin Weinberg in his role as an undercover operative in the Abscam investigation. Manifestly, Weinberg's role in relation to the United States is at the heart of Guccione's claim. Though the naval corpsmen in Sheridan may have had a duty to take reasonable steps to prevent any drunken person from leaving their hospital with a weapon, the only duty possibly owed to Guccione by the Government agents with responsibilities for the Abscam investigation was to exercise reasonable care in the supervision of those persons acting in some way to carry out the governmental objectives of that

> investigation. Weinberg, unlike the assailant in Sheridan, was carrying out the Government's business during the episode in which he allegedly injured the tort plaintiff, even though he may have exceeded the bounds of proper conduct in the particular way he chose to carry out his assignment. Any negligent supervision on the part of those supervising the Abscam investigation is not "entirely independent" of the relationship between Weinberg and the United States, whether or not Weinberg's status was technically that of an "employee." In such circumstances, the negligent supervision claim encounters the obstacle of the intentional tort exception.

(A-20-21) By order dated July 6, 1989, the Court of Appeals denied rehearing and rehearing en banc. (A-1)

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Those who succumbed to the criminal temptations presented as part of ABSCAM had a remedy for the excesses committed by the government as part of that sting operation. To the extent that the investigation was conducted unfairly, and in violation of targets' Constitutional rights, evidence would be suppressed, or criminal prosecution barred.

Some, however, like Robert C. Gucciione, resisted ABSCAM's blandishments, refused to commit crimes, and were punished for that courageous resistance. Under the Second Circuit's decision, those in his position are left without remedy or compensation. As demonstrated below, that unjust result is not compelled by the doctrine of sovereign immunity. Indeed, in enacting the Federal Tort Claims Act, Petitioner contends, Congress

waived governmental immunity from suit to allow victims to recover for damages caused by the negligence of government employers. This case presents the question whether the law leaves an innocent victim of a government sting operation without a remedy.

THE SECOND CIRCUIT MISUNDERSTOOD SHERIDAN v. UNITED STATES AND, IN SO DOING, RESTORED THE FTCA'S INTENTIONAL TORT EXCEPTION TO A STATE OF UTTER CONFUSION. IT ALSO IMPROPERLY RESOLVED THE IMPORTANT QUESTIONS THIS COURT LEFT OPEN IN SHERIDAN, AND DID SO IN A WAY THAT CONFLICTS WITH RULINGS OF THE NINTH CIRCUIT

Under the Federal Tort Claims Act, the government has waived immunity from suit for claims of property damage or personal injury caused by the "negligent or wrongful act or omission" of its employees "while acting within the scope of [their] employment, under circumstances where the United States, if a private person, would be liable to the

claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b).

There are, however, statutory exceptions to this limited waiver of sovereign immunity. The so-called "intentional tort exception," 28 U.S.C. §2680(h), is one. Section 2680(h) excludes from the waiver of sovereign immunity "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

Determining the scope of the intentional tort exception has proved exceedingly troublesome, especially in those cases where the claimant's injuries are alleged to have been caused by both the negligence of a government employee and the intentional act of another person.

The law has long been clear -- at least until the Second Circuit's decision in this case -- that, where the other person, the intentional tortfeasor, is not a government employee, the intentional tort exception does not come into play and does not bar the suit. Indeed, it was the opinion in a Second Circuit case, Panella v. United States, 216 F.2d 622 (2d Cir. 1954), authored by then-Judge John Marshall Harlan, which long stood as the leading case for that proposition.

In Panella, the plaintiff, an inmate at a government public health service hospital, was assaulted by another inmate. He argued that the assault was proximately caused by the negligence of the employees of the United States in failing to provide adequate supervision of those in the institution. The district court dismissed the complaint on the ground that the action involved a "claim

arising out of assault," under a theory that the exception "embraced assault by persons not employed by the Government as well as those committed by government employees." Id. at 623. The Court of Appeals reversed holding that the intentional tort exception was not applicable where the alleged intentional tortfeasor was not a government employee.[4]

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[4]In rejecting the district court's broader interpretation of §2680, the Second Circuit reasoned as follows:

> [S]uch a construction [would be] out of keeping with the rest of the act. For in the present case the only basis of liability against the Government is the negligence of its employees, not their deliberate torts, since the assailant was not a Government employee.... It is therefore important to distinguish cases in which it was sought to hold the Government liable on a negligence theory for assults committed by government employees .... In this case, however, a negligence action is not merely an alternative form of remedy to an action for assault but negligence is rather the essence of the plaintiff's claim.... Hence, to

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The principle of law announced by the Court of Appeals in Panella was uniformly followed by the other Federal Circuits, and was endorsed, implicitly, by this Court.[5] See, e.g., Bennett v. United States, 803 F.2d

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accept the Government's position on this appeal would in effect require us to read the assault and battery exception as having a wider impact than any of the other exeptions in §2680(h) -- i.e., that it embraces actions whose entire legal foundation rests solely on the failure of the Government to perform its duties. We think that the provision cannot properly be so expanded.

216 F.2d at 624-25.

[5]In United States v. Shearer, 105 S.Ct. 3039 (1985), four members of this Court suggested that §2680(h) bars an action that sounds in negligence but stems from a battery committed by a government employee. (This notion, never adopted by a majority of the Court, was repudiated in Sheridan. See infra at 23-26) But even these Justices were quick to note:

> Today's result is not inconsistent with the line of cases holding that the Government may be held liable for negligently failing to prevent

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1502 (9th Cir. 1986); Wine v. United States, 705 F.2d 366 (10th Cir. 1983); Gibson v. United States, 457 F.2d 1391, 1395-97 (3d Cir. 1977); Rogers v. United States, 397 F.2d 12, 15 (4th Cir. 1968). See United States v. Muniz, 374 U.S. 150 (1963) (prisoner who was assaulted by other inmates could recover damages from the United States because prison officials were negligent in failing to prevent the assault that caused his injury).

In Sheridan v. United States, 108 S.Ct. 2449 (1988), this Court clearly recognized the correctness of the rule excluding from the intentional tort exception cases where the intentional tortfeasor was not a government employee. The Court explained why: the

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> the intentional torts of a non-employee under its supervision. See, e.g., Panella v. United States, 216 F.2d 622 (C.A. 2 1954) (Harlan, J.).

105 S.Ct. at 3043.

intentional tort exception is simply inapplicable to torts that fall outside the scope of §1346(b)'s general waiver. 108 S.Ct. 2454.

Expressly adopting Judge (later Justice) Harlan's reasoning in Panella, this Court explained that "[t]he exception should ... be construed to apply only to claims that would otherwise be authorized by the basic waiver of sovereign immunity. Id. at 2454-55.

> Since an assault by a person who was not employed by the Government could not provide the basis for a claim under the FTCA, the exception could not apply to such an assault....

Id. at 2455.

That legal principle did not resolve the Sheridan case, for the intentional tortfeasor there was a government employee -- an off-duty serviceman. But the basic principle did provide the basis for the Court's resolution of the issue which Sheridan did present. The

Sheridan Court held that, even where the intentional tortfeasor is a government employee, suit is not necessarily barred. The Court asked essentially whether the intentional tortfeasor's acts would have given rise to governmental liability under the FTCA, under the general waiver of immunity. If they would not, then the intentional tort exception would not apply. Because the intentionally tortious conduct of the off-duty serviceman in Sheridan, not acting within the scope of his office or employment (like the intentionally tortious conduct of one not on the federal payroll) could not have given rise to government liability, there was no basis for applying the intentional tort exception in the Sheridan case.

If the intentionally tortious conduct of the government employee would have given rise to governmental liability under the FTCA

(without regard to the intentional tort exception), the Sheridan Court did not say that the intentional tort exception would bar suit, even one which alleged negligence by other federal employees. The Sheridan Court did not reach that question; it was simply not presented. And the Sheridan Court expressly left open the question "whether negligent hiring, negligent supervision, or negligent training may ever provide the basis for liability under the FTCA for a forseeable assault or battery by a Government employee." Id. at 2456, n.8.

Petitioner maintains that, on this record, it must be assumed that Weinberg was not an employee of the United States government. That being the case, the decision

of the Second Circuit in this case conflicts with Sheridan, confounds well-settled principles, and returns the law to a state of confusion of a magnitude even greater than that which existed prior to this Court's decision in Sheridan.

But assuming arguendo that Weinberg was an employee or that his relationship with the government was such that he could be treated as if he were a government employee, then the Second Circuit's decision still conflicts with Sheridan. At the very least, that decision implicitly -- and, Petitioner asserts, improperly -- decides the important question left open in Sheridan. In addition, the Court of Appeals' decision conflicts with decisions of the Ninth Circuit. For all of these reasons, and because these important issues

will continue to arise frequently, the petition for a writ of certiorari should be granted.

I. On The Record Of This Case, The Courts Were Obligated To Assume That Weinberg Was Not A Government Employee. That Being So, The Intentional Tort Exception Could Not Apply

Melvin Weinberg either was or he was not an employee of the United States government. That factual question is critical to analyzing whether this action may or may not be maintained under the FTCA for, under Sheridan, if Weinberg was not an employee, the intentional tort exception is irrelevant. Sheridan, 108 S.Ct. at 2455.[6]

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[6]The Second Circuit, failing to appreciate this, refused to consider whether Weinberg was or was not a government employee. Rather, rewriting Panella and all of the cases which followed that leading case, the Second Circuit held that the issue was not whether Weinberg was an employee, but rather whether there was any "work-related relationship" between him and the federal government. According to the Court, the absence of such a relationship assures that a negligent supervision claim really is the "essence" of the plaintiff's claim, and not a surreptitious way of seeking to hold the United States liable for the intentional torts of those in some way carrying out the government's business. That approach is wholly misguided and inconsistent

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Petitioner's position is simple. In this case, as in Sheridan and Panella v. United States, 216 F.2d 622 (2d Cir. 1954), there are two allegedly tortious acts. The first act is the intentional tort; the second is the act of negligence. In determining whether there is liability on the part of the United States, the status of the intentional tortfeasor constitutes the important first step in the analysis. The intentional tort exception could only come into play (although it would not necessarily bar the suit) if the intentional tortfeasor is a government employee. If a non-government employee commits an intentional tort there would be no initial liability on the government. Sheridan holds -- as did Panella -- that the intentional tort exception should be construed

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with Sheridan. Sheridan compels recognition of Petitioner's right to sue the United States under the Federal Tort Claims Act.

to apply only "to claims that would otherwise be authorized by the basic waiver of sovereign immunity." 108 S.Ct. at 2455. For a claim to be "otherwise ... authorized," the intentional tortfeasor must have been acting, during the commission of his intended tort, in a manner which could establish liability upon the government under the FTCA.

In Sheridan, no such liability could be imposed, and thus a claim would not "otherwise be authorized," because the intentional tortfeasor was off-duty at the time he committed the tort. In Panella, as here, no such liability could be imposed, and thus a claim would not "otherwise be authorized," because the intentional tortfeasor was a non-employee.[7] Pursuant to Panella, and every

[7] "If nothing more was involved here than the conduct of Carr at the time he shot at petitioners, there would be no basis for imposing liability on the government." Sheridan, 108 S.Ct. at 2455. Thus only if a (footnote continued)

case which has relied upon then-Judge Harlan's seminal opinion in that case, if a person not employed by the government commits the intentional tort, a cause of action is not barred by 28 U.S.C. §2680(h).

The panel's decision in the instant case is the sole exception to that rule.

II. Even If Weinberg's Relationship With The Government Were Such That He Could Be Treated As If He Were A Government Employee, The Second Circuit's Decision Still Conflicts With Sheridan: The Question Under Sheridan Is Not Whether There Was A "Work-Related Relationship"

The area in which the law is in a state of flux relates to intentional torts by government employees. It is only on this side of the ledger that the cases have been inconclusive and inconsistent. Some courts, particularly the Second Circuit, have been

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(footnote continued from previous page) claimant can establish negligence by some other government employee is there a waiver of sovereign immunity under 28 U.S.C. §1346(b).

concerned that, where a government employee commits an intentional tort, his claim can be converted by clever drafting into a negligence claim against the government and the intentional tort exception can thus always be circumvented.[8] See Johnson by Johnson v. United States, 788 F.2d 845 (2d Cir.), cert. denied, 107 S.Ct. 315 (1986); Miele by Miele v. United States, 800 F.2d 50 (2d Cir. 1986). This Court granted certiorari in Sheridan to resolve the question of whether there can be liability on the part of the government where the intentional tortfeasor is a government employee. The Court concluded that the intentional tortfeasor's receipt of a federal paycheck does not automatically bar a negligence claim against the government.

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[8] Petitioner suggests that the concern is unfounded. It may be possible to draft a complaint charging negligence, but claimant will still have to prove negligence to prevail.

Section 2680(h) can never apply if the government employee who committed the intentional tort was not "acting within the scope of his office or employment" for the FTCA waives the government's immunity from suit only for injuries caused by an "employee of the government while acting within the scope of his employment or office." 28 U.S.C. §1346(b).

Sheridan adopted and expanded upon the reasoning of Panella advanced by Petitioner throughout these proceedings. Under Sheridan, the intentional tort exception will not apply to bar the suit if, putting aside the exception, the intentionally tortious conduct would not subject the government to liability under the FTCA. That is the case if, as in Panella, the intentional tortfeasor is not a government employee. That is also the case if the government employee, as in Sheridan, was

off-duty when he acted. And it is also the case if, even though he was on duty, the intentionally tortious conduct was beyond the scope of his employment. The last is so for two reasons. First, the language of §1346(b) itself contains this "scope of employment" language. Second, under general tort principles wholly independent of the FTCA, an employer will not be liable for the torts of his employee if the employee is acting outside the scope of employment. See Riviello v. Waldron, 47 N.Y.2d 297, 418 N.Y.S.2d 300 (1979).

The Second Circuit did not apply these tests. Instead, it asked the question whether the intentional tort was "work related." That, however is not an appropriate stand-in for employer/employee; on-duty/off-duty; or within-the-scope of employment/outside-the-scope of employment because it does not make

the necessary distinction.[9] It does not permit one to answer the question whether, putting aside the exception, the government would otherwise be liable for the tortious conduct. In other words, just because the conduct was work-related does not mean that it would subject the government to liability under the FTCA; it also has to be within the scope of employment.

Petitioner maintains that, even if Weinberg was an employee, or is to be treated as one, he was acting beyond the scope of his employment in defaming and otherwise harming Guccione and that he is entitled to an

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[9]Whether an employee is acting within or outside the scope of his employment is relevant because where he is acting within, doctrines of respondeat superior come into play. Where he is acting outside the scope of his employment, respondeat superior can have no application. If he is acting outside the scope of employment, the employer will not be vicariously liable for his acts. Because there is no waiver of immunity as to such non-existent claims, there is no exception to be invoked.

opportunity to prove this.[10] If his conduct was "beyond the scope," the intentional tort exception cannot apply.

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[10]These, of course, are factual questions to be determined with reference to state law. See Doggett v. United States, 875 F.2d 684, 687 (9th Cir. 1989). Given that this was a sting operation, Weinberg may have been acting within the scope when he attempted to convince Guccione to engage in criminal acts. He surely was not, however, after his attempts had failed and he set out on a campaign to punish Guccione for his failure.

III. Even If The Second Circuit Were Right That Weinberg Should Be Treated As If He Were A Government Employee, The Court Has Answered The Question Left Open By Sheridan, And Answered That Question Incorrectly

The Sheridan Court expressly left open the question whether negligent hiring, negligent supervision or negligent training may ever provide the basis for liability under the FTCA for a foreseeable intentional tort by a government employee. If the Second Circuit is right that Weinberg's relationship with the government made him the equivalent of an employee, this case presents that question.

The Second Circuit has apparently answered the question: no. Petitioner maintains that it erred in so holding.

There is no reason to bar FTCA suits for negligent supervision, negligently hiring, or negligent training simply because the

negligent conduct permits the occurrence of an intentional tort by the negligently trained, supervised or hired government employee.

Negligence is the gravamen of such a complaint, and negligence will have to be proved in order for the claimant to recover. The FTCA was enacted to permit recovery for harms caused by the negligence of governmental employees. Negligent supervision cases thus fall squarely within the FTCA's waiver of sovereign immunity.

The Court below rejected this, not based on the language of the FTCA, nor on what Congress intended the FTCA to accomplish. Rather, it rejected it, it appears, because of its view that, putting aside the FTCA, no cause of action for negligence would or should lie.

In the Court of Appeals' view, no duty of care was owed to Guccione; thus no duty of care could have negligently been breached.

The Court of Appeals' hostility towards this negligence claim was inappropriate. Under the statutory scheme, questions of duty and standard of care -- both elements of a negligence claim -- are to be answered by reference to state law, and cannot be resolved as a matter of law on this record. Petitioner submits that, under applicable law, because the government agents placed Guccione in a position of vulnerability,[11] they owed him a

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[11] In its opinion on rehearing, the Court of Appeals wrote that suit would not lie under the FTCA because "the only duty possibly owed to Guccione by the Government agents with responsibilities for the Abscam investigation was to exercise reasonable care in the supervision of those persons acting in some way to carry out the governmental objectives of that investigation." (A-20-21) The statement is wrong for several reasons.

First, under the FTCA, the duty owed to the claimant is determined not by the FTCA,

(footnote continued)

duty of care. He has alleged that they negligently breached it, and that this was the proximate cause of his injuries.[12] He has stated a valid cause of action.

(footnote continued from previous page)
but by reference to state law. Petitioner maintains that under state law, the government agents in charge of the investigation owed him a duty of care and negligently breached that duty when, after allowing Weinberg to engage in a crusade against the plaintiff after having put him in a position to do so, it failed to exercise its duty to protect a foreseeable victim. The government knew that an operative had expressed his desire to punish Petitioner for his refusal to engage in criminal activity. By affirmatively placing the Petitioner in a foreseeably vulnerable position, and by intentionally hiding the government's role from Petitioner, the government assumed a duty to control its operative and to insure that its covert sting operation was caried out in a prudent and responsible manner. Cf. Kearney v. United States, 815 F.2d 535, 537 (9th Cir. 1987) ("The negligence of the government in this case was that of the government placing a predator in such loose custody that he could ... escape fromcustody and commit a murder"); Thigpen v. United States, 800 F.2d 393, 399, n.7 (4th Cir. 1986) (Murnaghan, J., dissenting) ("A defendant may also asume an affirmative duty to protect the plaintiff by entering into a special relationship with the plaintiff's assailant ... [such as] where the
(footnote continued)

IV. The Decision Of The Second Circuit Conflicts With Decisions Of The Ninth Circuit

As demonstrated above, the Second Circuit has, implicitly, decided the issue specifically left open in Sheridan. It has apparently ruled that the United States may not be held liable under the FTCA for negligent supervision where the person

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(footnote continued from previous page) assailant is a violent patient ... the hospital is held to assume a affirmative duty to protect any person who might foreseeably become a victim of the patient's attacks").

Second, a governmental employee's breach of a duty of care, through negligence, is precisely the kind of claim which is actionable under the FTCA.

[12]The Second Circuit's hostility to Guccione's claim may also rest on the notion that whatever the supervisors' negligence may have been, it was not the proximate cause of Guccione's injuries; rather, Weinberg's acts were intervening and superseding causes. These questions, too, must be answered with reference to state law. They cannot be resolved on this record as a matter of federal law.

negligently supervised commits on intentional tort. This ruling conflicts with the rule which exists in the Ninth Circuit.

In a series of cases, the Ninth Circuit has held that §2680(h) is not a bar to a suit against the United States based on the negligent supervision of an employee that proximately results in an intentional tort. See, Kearney v. United States, 815 F.2d 535, 538 (9th Cir. 1987); Bennett v. United States, 803 F.2d 1502, 1503-04 (9th Cir. 1986); Knappick v. United States, No. 88-2462, 875 F.2d 318 (Table) (9th Cir. May 18, 1989) (unpublished memorandum opinion available on Westlaw).

In Kearney, complainant sued under the FTCA for the wrongful death of his wife, the victim of an assault, battery, rape and murder at the hands of an army private who had escaped from confinement due to allegedly

negligent supervision by other military personnel. The district court granted summary judgment to the government, applying the intentional tort exception to the FTCA. The Court of Appeals reversed, carefully explaining its reasoning.

> The difficult question in this case is whether Congress intended by the assault and battery exception to bar this kind of action against the federal government when the alleged harm resulted from the government's own negligence in failing to supervise properly a prisoner confined to barracks. As we indicated in Bennett, Shearer gives no definitive answer, and the historical evidence of Congressional intent is not very clear. 803 F.2d 1504. The purpose of the Federal Tort Claims Act is to provide a remedy to citizens injured by governmental negligence in circumstances in which the same act of negligence would impose liability under state law, but for governmental immunity. On the other hand, it is clear that with federal employees numbering in the millions, Congress did not want the treasury to be the ultimate

deep pocket for every plaintiff injured in an altercation with a federal employee....

The courts construing §2680(h) have given effect to these aims by interpreting the subsection as shielding the government from respondeat superior liability for batteries by employees, not from the consequences of its own negligence. See Bennett, 803 F.2d at 1503-04. Thus, courts have drawn a line that preserves government immunity from liability for those batteries committed by government employees including members of the armed forces, guards, and police officers, while imposing liability upon the government for those batteries committed by persons under government control who are negligently supervised or controlled, such as patients, see, e.g., Jablonski, 712 F.2d 391; Underwood v. United States, 356 F.2d 92 (5th Cir. 1966,) prisoners, see, e.g., United States v. Muniz, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963); Rogers v. United States, 397 F.2d 12 (4th Cir. 1986), and, in rare cases, employees known to be dangerous. See Bennett, 803 F.2d 1502; Gibson v. United States, 457 F.2d 1391 (3d Cir. 1971). We see no principled

> reason to permit recovery when the government has been negligent in supervising nonemployees, but to deny recovery, as the district court did in this case, when the government has been negligent in supervising an employee. Bennett, 803 F.2d at 1504.
>
> In the case at bar, the murder probably included an assault and battery. But the liability of the government is not predicated on respondeat superior liability for the soldier's murder of Kearney, but on the negligence of the government itself. The negligence in this case was that of the government in placing a known predator in such loose custody that he could, with the aid of a few dollars in bribes and two wholly incompetent, if not corrupt, government employees, escape from custody and commit a murder while awaiting trial for other violent crimes.

815 F.2d 536-37.

Petitioner suggests that the Ninth Circuit has construed the intentional tort exception correctly: the statutory exception shields the government from suit on a

respondeat superior theory for the intentional torts of its employees. It does not, as the Second Circuit has held, operate to bar certain classes of negligence cases, specifically, those involving negligent supervision. The intentional tort exception is fundamentally irrelevant to the government's liability for negligent supervision. Whether there is liability in each such case will depend upon the particular facts and on state law, not on §2680(h).

CONCLUSION

These issues have long plagued the courts, and will continue to do so until resolved by this Court. This case presents an appropriate vehicle for their resolution. For these reasons, Petitioner respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

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Of Counsel

Dated: October 3, 1989

A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the sixth day of July, one thousand nine hundred and eighty-nine.

ROBERT C. GUCCIONE,
Plaintiff-Appellant, Docket No. 87-6207
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

UNITED STATES COURT OF APPEALS
Filed
Jul -6 1988
Elaine B. Goldsmith, Clerk
SECOND CIRCUIT

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiff-appellant Robert C. Guccione;

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 662—August Term 1987

Argued: January 15, 1988 Decided: May 26, 1988

Docket No. 87-6207

ROBERT C. GUCCIONE,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

OAKES, NEWMAN, and MINER,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York (Constance Baker Motley, Judge) dismissing plaintiff's claim for damages in a suit alleging negligence by the Federal Bureau of Investigation in conducting its Abscam operation. 670 F. Supp. 527 (S.D.N.Y. 1987).

Affirmed.

ALAN M. DERSHOWITZ, Cambridge, Mass. (Nathan Z. Dershowitz, Victoria B. Eiger, Mark D. Cahn, Dershowitz & Eiger, New York, N.Y., on the brief), *for plaintiff-appellant.*

DAVID R. LEWIS, Asst. U.S. Atty., (Rudolph W. Giuliani, U.S. Atty., Nancy Kilson, Asst. U.S. Atty., New York, N.Y., on the brief), *for defendant-appellee.*

JON O. NEWMAN, *Circuit Judge*:

Robert C. Guccione appeals from a judgment of the District Court for the Southern District of New York (Constance Baker Motley, Judge) dismissing his claim for damages against the United States allegedly resulting from the negligence of the Federal Bureau of Investigation (FBI) in conducting its highly publicized Abscam operation in the late 1970's. Guccione's complaint charges that the FBI negligently failed to prevent a paid operative, Melvin Weinberg, from defaming Guccione to potential lenders and otherwise tortiously interfering with his attempt to secure financing for completion of a casino and hotel project in Atlantic City, New Jersey. The complaint seeks $400 million in damages. The District Court, in an opinion reported at 670 F. Supp. 527, entered judgment for the United States on the ground that the action is barred by sovereign immunity under the "intentional tort exception" to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(h) (1982), and alternatively that the action is time-barred under the applicable two-year statute of limitations. We affirm on the immunity ground.

Background

Plaintiff-appellant Guccione, a businessman and publisher of Penthouse Magazine, initiated plans in the late 1970's to build a Penthouse Casino and Hotel in Atlantic City, New Jersey. The project's success depended in part upon securing financing and a casino license. Guccione alleges that an entity operating as Abdul Enterprises, Ltd. ("Abdul") was among the numerous potential lenders with which he was in contact during this time to secure financing for his project. Melvin Weinberg acted as the agent and representative of Abdul for these purposes. Abdul was not in fact a prospective lender, but an FBI undercover organization created by the FBI to carry out the Abscam sting operations.[1] Through Abdul, FBI operatives sought to uncover criminal activities by holding themselves out as the representatives of two wealthy Arab sheiks in search of American "investment opportunities" in the nascent casino and gambling industry in Atlantic City. Weinberg worked undercover in the Abscam investigation as an FBI operative and informant. His background and general role in Abscam have been described as follows:

> Abscam began after Melvin Weinberg in 1977 was convicted in the Western District of Pennsylvania on his plea of guilty to fraud. In return for a sentence of probation Weinberg agreed to cooperate with the FBI in setting up an undercover operation similar to the London Investors, Ltd. "business" that Weinberg

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1 The background of the Abscam investigation is detailed in *United States v. Myers*, 692 F.2d 823, 829-34 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983). *See also United States v. Silvestri*, 719 F.2d 577, 579-80 (2d Cir. 1983).

had used with remarkable success before his arrest and conviction in Pittsburgh.

> For most of his life Weinberg had been a "con man" operating in the gray area between legitimate enterprise and crude criminality. For a number of years in the 1960s and early 1970s, he had been listed as an informant by the FBI and had provided his contact agent from time to time with intelligence about various known and suspected criminals and criminal activities in the New York metropolitan area and elsewhere, for which he had received in return occasional small payments of money. When he was arrested on the charge that led to his guilty plea, his informant status was cancelled, later to be reinstated after his guilty plea and agreement to cooperate with the FBI.

United States v. Myers, 692 F.2d 823, 829 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983) (quoting *United States v. Myers*, 527 F. Supp. 1206, 1209 (E.D.N.Y. 1981)).

It is undisputed that Weinberg, acting as Abdul's representative, met or spoke with Guccione on at least three occasions during the course of the Abscam investigation to discuss the possibility of providing financing for Guccione's casino and hotel project. In these conversations Weinberg unsuccessfully sought to induce Guccione's participation in a scheme to secure a casino license through bribery or other illegal means. The tortious conduct alleged in the complaint arises out of Weinberg's initial attempt to create conditions that would compel Guccione's participation in the scheme, and his subsequent campaign to "punish" Guccione for refusing to cooperate. Weinberg allegedly told Guccione's business associates false stories about Guccione's ailing financial condition, his organized crime connections, and his unlikely prospects for

receiving a casino license. When Weinberg recognized that Guccione would not join the illegal scheme, he told a Guccione business associate: "The best way to punish him [Guccione], he doesn't get the [casino project] built—that punishes more than anything else." Weinberg allegedly carried out this vindictive campaign by further maligning Guccione in statements to prospective lenders, influential politicians, and other business associates. The complaint claims that as a direct result of Weinberg's defamation and interference with Guccione's business interests, Guccione was unable to secure the necessary financing for the project between 1979 and 1983, when an exculpatory Senate Report[2] was published and disseminated to lenders.

The District Court dismissed Guccione's complaint for lack of subject matter jurisdiction because of sovereign immunity. The Court held that Guccione's claims against the United States, though pleaded in negligence, were claims "arising out of" the alleged intentional torts of the FBI operative, Weinberg, and were therefore barred by the "intentional tort" exception to the general waiver of sovereign immunity contained in the FTCA, 28 U.S.C. §§ 1346(b) (general waiver), 2680(h) (intentional tort exception) (1982). Alternatively, the District Judge granted the Government's motion for summary judgment on the ground that Guccione had failed to bring his action within the applicable two-year limitations period. Judge Motley found that plaintiff's claim was not first presented until November 28, 1984, or at the earliest July 18, 1984, but had accrued no later than March 1982. Judge Motley

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2 Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice to the United States Senate ("the Senate Report"), S. Rep. No. 682, 97th Cong., 2d Sess. (1982). Part F of the Senate Report, entitled "Allegations Regarding the Investigation of Bob Guccione," provides much of the factual basis for the complaint.

rejected Guccione's contention that he did not have notice of the defamatory conduct underlying his claim until the release of the Senate Report, *supra* n.2.

Discussion

Under the FTCA, the Government has waived immunity from suit for claims of property damage or personal injury caused by the "negligent or wrongful act or omission" of its employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Section 2680(h) of the FTCA, the so-called intentional tort exception, excludes from this limited waiver of sovereign immunity "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[3] The task of maintaining the FTCA's jurisdictional boundary has been more difficult in practice than is suggested by the statute's facially neat distinction between claims sounding in negligence and those "arising out of" the enumerated intentional torts. Difficulty has arisen primarily in situations in which intentionally inflicted harm may have occurred in significant part because of the negligence of Government personnel. Appellant contends that this is such a case, and that his "negligent supervision" claim is actionable notwithstand-

3 In 1974, Congress amended FTCA coverage to include assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution by federal officials empowered to make searches, seizures, or arrests. Act of Mar. 22, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (amending 28 U.S.C. § 2680(h)). Appellant does not contend that this exception to the section 2680(h) exception applies in the present case.

ing the apparent applicability of section 2680(h) to Weinberg's conduct.

Appellant's claim initially encounters a rather inhospitable line of cases broadly interpreting the scope of section 2680(h) in the context of "mixed" claims of negligence and intentional tort. *United States v. Shearer*, 473 U.S. 52 (1985), was an action brought by the survivor of a serviceman who, while off duty and away from his base, had been kidnapped and murdered by another serviceman. The suit alleged that the Army knew of the assailant's dangerousness and negligently failed to warn others that he was at large. Chief Justice Burger, in a plurality opinion joined by three other Justices, found the claim barred by the express language of section 2680(h):

> Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a Government employee.

Id. at 55 (emphasis in original).[4]

This Court expressly adopted the *Shearer* plurality's view in *Johnson v. United States*, 788 F.2d 845 (2d Cir.), *cert. denied*, 107 S. Ct. 315 (1986). We affirmed the dismissal of a suit brought against the United States, alleging negligent supervision of a postman who had sexually molested the child plaintiff. Indicating our "agree[ment] with the Chief Justice that the plain language of § 2680(h) prohibits claimants from clothing assault and battery actions in the garb of negligence by claiming negligent failure to prevent the attack," *id.* at 850, we concluded that the

4 A majority of the Court agreed that the claim was barred under the doctrine of *Feres v. United States*, 340 U.S. 135 (1950).

plaintiff could not avoid the FTCA's jurisdictional restrictions simply by alleging that the United States Postal Service had negligently hired, assigned, and supervised the assaultive postman "with notice or knowledge of [his] criminal and perverted propensities and tendencies," *id.* at 854.

We reaffirmed this interpretation of the "arising out of" phrase of section 2680(h) in *Miele v. United States*, 800 F.2d 50 (2d Cir. 1986), a suit brought on behalf of a child who had been permanently blinded and disfigured when an AWOL soldier threw acid in his face. The complaint alleged that the Army was on notice that the soldier had previously displayed an obsessive hostility toward the child and presented an imminent threat to him, and claimed that the Army was negligent in failing to appreciate the danger posed by the soldier's disturbed mental state, failing to adequately supervise the soldier, and failing to warn the plaintiff of the soldier's delusionary preoccupation with the child. Relying on *Shearer* and *Johnson*, we affirmed dismissal of the claim on the ground that the allegation of negligence merely re-presented the assault claim in artfully redrawn form. We note that most other circuits considering the question have adopted similarly broad views of the scope of section 2680(h) in the context of mixed claims of negligent and intentional conduct. *See Sheridan v. United States*, 823 F.2d 820 (4th Cir. 1987), *cert. granted*, 108 S. Ct. 747 (1988); *Thigpen v. United States*, 800 F.2d 393 (4th Cir. 1986); *Hoot v. United States*, 790 F.2d 836 (10th Cir. 1986); *Satterfield v. United States*, 788 F.2d 395, 399 (6th Cir. 1986); *Garcia v. United States*, 776 F.2d 116, 118 (5th Cir. 1985); *Wine v. United States*, 705 F.2d 366 (10th Cir. 1983); *Naisbitt v. United States*, 611 F.2d 1350 (10th Cir.), *cert. denied*, 449 U.S. 885 (1980). *But see Morrill v. United States*, 821 F.2d

1426 (9th Cir. 1987); *Kearney v. United States*, 815 F.2d 535 (9th Cir. 1987); *Bennett v. United States*, 803 F.2d 1502 (9th Cir. 1986).

Appellant advances two theories to distinguish the present case from *Shearer*, *Johnson*, and *Miele*. His primary contention is that under case law interpreting section 2680(h), particularly *Panella v. United States*, 216 F.2d 622 (2d Cir. 1954), the statute's jurisdictional bar does not apply to claims that arise out of the intentional torts of non-governmental employees. He argues that the intentional tort exception is inapplicable in the present case because Weinberg qualifies as a non-governmental employee under the *Panella* rule, or at least that the nature of Weinberg's relationship to the Government raises a substantial question of fact unsuited for disposition at this stage of the proceedings. Alternatively, appellant contends that Weinberg's intentional wrongdoing is separate and distinct from the gravamen of the complaint, which is that the FBI, by "failing to exercise requisite care in selecting, training, instructing, supervising and controlling Weinberg," Brief of Appellant at 27 n.11, breached an "independent affirmative duty" owed to appellant himself: "There can be little question that by knowingly allowing Weinberg to engage in a crusade against Guccione, the government failed to exercise its duty to protect a foreseeable victim," *id.* at 25. Neither argument withstands scrutiny.

The Panella *Exception.* In *Panella*, *supra*, we held that a patient/inmate who had been assaulted by a fellow inmate at a federal prison hospital was not barred from bringing suit against the United States for failure adequately to supervise and protect those confined there. Appellant misreads *Panella* to establish a jurisdictional test

turning upon the technical nuances of the intentional tortfeasor's employment relationship to the Government. Though a rigid employee/non-employee jurisdictional rule could be extracted from the often abbreviated references to *Panella* in subsequent case law,[5] shorthand references should not be permitted to obscure the decision's precise holding.

In *Panella*, the fact that the assailant was not a federal employee warranted emphasis only because it served ás a useful way to demonstrate that, despite the claim's mixed allegations of both negligence and intentional conduct, the plaintiff's "negligence action is not merely an alternative form of remedy to an action for assault but negligence is rather the essence of the plaintiff's claim," *Panella v. United States*, *supra*, 216 F.2d at 624. The absence of *any* employment or work-related relationship between the assailant and the federal government provided a simple, unequivocal assurance that the negligent supervision claim really was the "essence" of the claim and not a surreptitious way of seeking to hold the United States liable for the intentional torts of those in some way carrying out the Government's business. *Panella* thus established a clear rule of easy application: where the intentional tortfeasor is *in no sense* carrying out the Government's business, the

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5 *See United States v. Shearer*, *supra*, 473 U.S. at 56 ("Today's result is not inconsistent with the line of cases holding that the Government may be held liable for negligently failing to prevent the intentional torts of a non-employee under its supervision."); *Thigpen v. United States*, *supra*, 800 F.2d at 394 n.3; *Johnson v. United States*, *supra*, 788 F.2d at 851; *Jablonski v. United States*, 712 F.2d 391, 395 (9th Cir. 1983); *Naisbitt v. United States*, *supra*, 611 F.2d at 1355; *Underwood v. United States*, 356 F.2d 92, 100 (5th Cir. 1966); *Muniz v. United States*, 305 F.2d 285, 287 (2d Cir. 1962), *aff'd*, 374 U.S. 150 (1963); *Hughes v. Sullivan*, 514 F. Supp. 667, 669-70 (E.D. Va. 1980), *aff'd*, 662 F.2d 219 (4th Cir. 1981) (per curiam); *Pennington v. United States*, 406 F. Supp. 850, 851-52 (E.D.N.Y. 1976).

claim against the United States for negligent supervision of the assailant does not "arise out of" an intentional tort within the meaning of section 2680(h).[6]

Thus understood, *Panella* does not permit a negligent supervision claim to succeed whenever the intentional tortfeasor is not technically an "employee"[7] of the United States but nonetheless advancing the Government's interests in some more attenuated employment relationship or acting as an independent contractor.[8] A jurisdictional rule based upon such technicalities, as urged by appellant, is not suggested by either the language of section 2680(h) or its underlying purposes. As we observed in *Johnson* and *Miele*, the "arising out of" language is broad and must not be circumvented by techniques of artful pleading. Likewise, the legislative history, though meager, *see Johnson v. United States*, *supra*, 788 F.2d at 852-53 & n.5, car-

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6 Obviously, the negligence claim in *Panella* had to be rooted in *some* relationship between the Government and either the assailant or the victim. *See infra* n.9. The critical point here is that the relationship must be something other than the Government's purported duty to supervise or control those carrying out its business.

7 The FTCA defines "employee of the government" to include "officers or employees of any federal agency . . . and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. § 2671 (1982). *See Witt v. United States*, 462 F.2d 1261, 1263-64 (2d Cir. 1972) (language to be broadly construed).

8 Appellant's reliance on *Slagle v. United States*, 612 F.2d 1157 (9th Cir. 1980), as a model for analysis is unavailing. Though the Ninth Circuit undertook to determine the precise nature of an informant's employment status in *Slagle*, the inquiry was made in the context of a claim against the Government for harm allegedly caused by the informant's negligence, not his intentional conduct. That close factual determinations concerning employment status are necessary under 28 U.S.C. § 2671, *see supra* n.7, does not provide persuasive grounds for extending the practice to decide mixed-claim cases under section 2680(h).

ries no suggestion that Congress contemplated the technical rule advanced by appellant. *See, e.g., Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Committee on the Judiciary*, 77th Cong., 2d Sess. 33 (1942) (section 2680(h) directed at situations in which "*some agent of the government* gets in a fight with some fellow . . . [a]nd socks him") (emphasis added).

Appellant understandably reads *Panella* quite differently. He believes that the rationale of this decision is a sharp distinction between the intentional torts of Government *employees* and the intentional torts of all others. In his view, *Panella* made that distinction to guard against the risk that a claim alleging negligent supervision of an employee tortfeasor would succeed because the fact-finder is influenced by the doctrine of *respondeat superior*, even though the claim nominally alleges primary negligence on the part of the Government. His point is that intentional torts of *non-employees* should survive dismissal because such claims encounter no risk that an allegation of primary negligence on the part of the Government will be a pretext for imposing liability on the basis of *respondeat superior*, which is unavailable absent an employee or similar master-servant relationship, *see Prosser and Keeton on the Law of Torts* § 70 (5th ed. 1984).

This approach is flawed in two respects. First, it converts what is only a mechanical device for enabling the fact-finder to focus on the primary negligence of the Government into an absolute jurisdictional rule. If the critical jurisdictional question were whether negligence on the part of some Government personnel could be isolated as the primary or essential basis of the claim, the inquiry could be more sensibly carried out without pausing to ascertain the intentional tortfeasor's employment status.

See Sheridan v. United States, *supra*, 823 F.2d at 825 (Winter, J., dissenting); Note, *The Talismanic Language of Section 2680(h) of the Federal Tort Claims Act*, 69 Temple L.Q. 243 (1987); Note, *Section 2680(h) of the Federal Tort Claims Act: Government Liability for Negligent Failure to Prevent an Assault and Battery by a Federal Employee*, 69 Geo. L.J. 803 (1981). Indeed, one circuit has interpreted section 2680(h) to permit negligent supervision claims against the Government as long as the employee's intentional wrongdoing was a foreseeable consequence of the alleged negligence. *See Morrill v. United States*, *supra*, 821 F.2d at 1427 (citing Ninth Circuit cases).

Second, and more fundamentally, appellant's view of *Panella* fails to take into account subsequent case law in this Circuit that illuminates the boundaries of section 2680(h). In our effort to explain *Panella*, we are obliged to recognize that this decision does not stand in isolation but is part of a sequence that now includes *Johnson* and *Miele*. These latter cases demonstrate that the United States is not liable for the intentional torts of those carrying out its business, even though the plaintiff alleges a claim of primary negligence on the part of the United States in failing to supervise or otherwise avoid foreseeable risks. In *Miele*, for example, the plaintiffs alleged that the Army "negligently failed to: (1) appreciate [the assailant's] paranoid schizophrenic mental state; (2) adequately supervise [the assailant]; and (3) warn plaintiffs of [the assailant's] delusionary preoccupation toward them." *Miele v. United States*, *supra*, 800 F.2d at 51. These claims, held to be barred under section 2680(h), are functionally indistinguishable from appellant's allegations in the present case. In both cases the gravamen of the complaint is that the Government failed to exercise adequate control over an

individual committing intentionally tortious conduct while acting in some capacity on the Government's behalf.

Weinberg, even if not technically a federal "employee," was certainly acting on the Government's behalf as an undercover operative carrying out the Abscam investigation. The language of appellant's complaint itself furnishes a sufficient basis for barring his claim under *Panella*, *Johnson*, and *Miele*: "[T]he FBI employed or otherwise engaged Melvin Weinberg to assist in the [Abscam] investigation as an informant and operative, and Weinberg rendered his services, including all acts complained of herein, while under the control and supervision of the FBI and its special agents." Complaint ¶ 5; *see also id.* at ¶¶ 7, 8, 11, 17, 18.

The "Independent Affirmative Duty" Exception. Appellant's alternative argument is also without merit. Despite the broad reading given to section 2680(h)'s "arising out of" language, we have suggested that it may not bar mixed claims of negligence and intentional conduct in the relatively uncommon case in which the negligence alleged "was independent of the government's supervision of its employees," *Johnson v. United States*, *supra*, 788 F.2d at 853 n.8 (discussing cases). The precise contours of this "independent affirmative duty" doctrine are slowly evolving in other circuits, *see Doe v. United States*, 838 F.2d 220, 222-24 (7th Cir. 1988) (duty of Government child care center toward children in its care); *Thigpen v. United States*, *supra*, 800 F.2d at 398-402 (Murnaghan, J., concurring) (duty of Government hospital toward patients); *Gibson v. United States*, 457 F.2d 1391, 1394-96 (3d Cir. 1972) (duty to prevent assaultive conduct of juvenile delinquent Job Corps trainee under Government

care), and the doctrine has yet to be considered directly by this Court.[9]

The pending case, however, provides no occasion for elaboration of the doctrine. The mere fact that Guccione was the subject of an undercover investigation by the FBI gave rise to no special "affirmative duty" to protect Guccione independent of the Government's duty to supervise its agents. All citizens, of course, have the right to expect that the Government's agents will not cause deliberate harm to innocent persons. Breach of the high public trust necessarily placed in those carrying out covert law enforcement investigations justifiably causes concern, just as the magnitude of the indecencies alleged in *Johnson* was compounded due to the assailant's identity as an on-duty United States mail carrier. Yet to find an "independent affirmative duty" owed to each citizen in every case in which the Government carries out its basic functions would create an exception that would swallow the rule of section 2680(h). The present case is not one in which a plaintiff has been placed in the care or custody of the Government and thereafter suffers harm as a result of the negligent performance of a duty of protective care that the plaintiff was

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9 *Panella v. United States*, *supra*, might be read as an affirmative duty case if attention is shifted from the Government's relationship to the *assailant* to its relationship to the *victim*, a patient at a federal prison hospital. *See also Brown v. United States*, 486 F.2d 284, 288 (8th Cir. 1973) (FTCA claim permitted where federal prisoner attacked by fellow inmates); *Rogers v. United States*, 397 F.2d 12, 15 (4th Cir. 1968) (FTCA claim permitted where prisoner alleged federal negligence led to attack by guardian); *cf. United States v. Muniz*, 374 U.S. 150 (1963) (prisoner attacked by other inmates permitted to claim Government negligent in providing protection). Under this approach, the Government undertakes a duty of reasonable care to protect those in its penal custody from foreseeable harm, whatever its source. *See Prosser and Keeton on Torts*, *supra*, at 383 n.9; *Restatement (Second) of Torts* § 314A, illustration 6 (1965); *see also* P. Schuck, *Suing Government* 33 (1983) (noting historical roots of liability of sheriffs and jailers).

entitled to rely upon. *See Doe v. United States*, *supra* (children in Government child care center); *Doe v. Scott*, 652 F. Supp. 549 (S.D.N.Y. 1987) (same); *Loritts v. United States*, 489 F. Supp. 1030 (D. Mass. 1980) (member of singing group invited to visit West Point). There is no suggestion that Guccione relied upon the Government's affirmative provision of care or services of any kind. *Cf. Indian Towing Co. v. United States*, 350 U.S. 61 (1955) (Government liable for damages caused by negligently maintained lighthouse). Indeed, as far as Guccione knew, he was entering into arms-length business negotiations with a representative of Abdul, and he conducted himself accordingly. Whatever the ultimate contours of the affirmative duty doctrine, it is unavailable to Guccione under the circumstances of this case.

In view of our disposition, it is not necessary to reach the statute of limitations issue.

The judgment of the District Court is affirmed.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 662—August Term 1987

On petition for rehearing Decided: June 9, 1989

Docket No. 87-6207

ROBERT C. GUCCIONE,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

OAKES, *Chief Judge*,
NEWMAN and MINER, *Circuit Judges*.

JON O. NEWMAN, *Circuit Judge*:

Appellant has petitioned for rehearing of our decision in *Guccione v. United States*, 847 F.2d 1031 (2d Cir. 1988), contending that the subsequent decision of the Supreme

Court in *Sheridan v. United States*, 108 S. Ct. 2449 (1988), obliges us to reinstate his claim. We disagree.

Sheridan concerned a claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680 (1982), brought by plaintiffs who had been wounded during the shooting escapade of an off-duty serviceman. Seeking to avoid the bar of the intentional tort exception to the FTCA, *id.* § 2680(h), the plaintiffs sought to hold the United States liable because of the negligence of three naval corpsmen in permitting the assailant to leave a naval hospital with a weapon in his possession. The corpsmen had found the assailant face down in a drunken stupor on the floor of the hospital. The Supreme Court ruled that the intentional tort exception was inapplicable because, though the assailant was an employee of the United States, his employment status "ha[d] nothing to do with the basis for imposing liability on the Government." 108 S. Ct. at 2455. The Court pointed out that the negligence of the three naval corpsmen "may furnish a basis for Government liability that is entirely independent of [the assailant's] employment status." *Id.* Their conduct could cast liability upon the Government even if the person they had permitted to leave the hospital with a weapon had no connection whatever with the United States.

Sheridan does not aid Guccione. His claim is based on the negligence of the United States in failing to supervise Melvin Weinberg in his role as an undercover operative in the Abscam investigation. Manifestly, Weinberg's role in relation to the United States is at the heart of Guccione's claim. Though the naval corpsmen in *Sheridan* may have had a duty to take reasonable steps to prevent any drunken person from leaving their hospital with a weapon, the only duty possibly owed to Guccione by the Government agents

with responsibilities for the Abscam investigation was to exercise reasonable care in the supervision of those persons acting in some way to carry out the governmental objectives of that investigation. Weinberg, unlike the assailant in *Sheridan*, was carrying out the Government's business during the episode in which he allegedly injured the tort plaintiff, even though he may have exceeded the bounds of proper conduct in the particular way he chose to carry out his assignment. Any negligent supervision on the part of those supervising the Abscam investigation is not "entirely independent" of the relationship between Weinberg and the United States, whether or not Weinberg's status was technically that of an "employee." In such circumstances, the negligent supervision claim encounters the obstacle of the intentional tort exception.

The petition for rehearing is denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROBERT C. GUCCIONE, : 85 Civ. 0333 (CBM)

Plaintiff, :

-against- :

UNITED STATES OF AMERICA, :

Defendant. :

----------X

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OPINION

MOTLEY, District Judge.

Plaintiff Robert C. Guccione has brought this lawsuit under the Federal Tort Claims Act, 28 U.S.C. §1346(b), for injuries he allegedly sustained during the course of the FBI's highly publicized ABSCAM investigation of government corruption in late 1970's. Guccione is a well known magazine publisher and entertainment entrepreneur. He claims that his attempts to obtain financing for a contemplated Atlantic City, New Jersey casino were obstructed by the malicious and intentionally tortious conduct of an ill supervised FBI operative, Melvin Weinberg, thus causing Guccione injury in excess of four million dollars.

The Government has now moved for judgment on the pleading pursuant to Fed. R. Civ. P. 12(c) on the grounds that this court is

without jurisdiction over plaintiff's claim because of sovereign immunity. The Government has moved in the alternative for summary judgment on the ground that this action is barred by the statute of limitations.

Because, for the reasons that follow, this court finds plaintiff's claim is barred both on sovereign immunity and statute of limitations grounds, the Government's motions are granted and this case is dismissed.

Sovereign Immunity

a. Background

Plaintiff alleges in his complaint that he was injured by the FBI's negligent supervision and control of Melvin Weinberg, a key operative in the FBI's ABSCAM investigation in the 1970's. Specifically, plaintiff alleges that "in carrying out ABSCAM, the FBI employed or otherwise engaged Melvin Weinberg," an individual with a known

history of illegal fraudulent activity, "to assist in the investigation as an informant operative, and [that] Weinberg rendered his services ... while under the control of the FBI and its special agents." (Complaint, ¶¶5, 6, 7) According to plaintiff, Weinberg posed as the agent of a fictitious Arab investment company called Abdul Enterprises at the direction and under the supervision of the FBI. (Complaint ¶8)

During the period of time that ABSCAM was being carried out, plaintiff was attempting to obtain financing for an Atlantic City casino project. In connection with this project, Guccione's application for a casino license was pending before various state and local New Jersey authorities. (Complaint ¶9, 10) Plaintiff alleges that Melvin Weinberg, acting "with the full knowledge, acquiescence, support, cooperation, assistance and/or

direction of his supervising FBI agents," "undertook to persuade plaintiff to commit illegal acts," including the bribery of a state casino licensing official. (Complaint ¶11) When Guccione, according to his complaint, refused to participate in the illegal activities, "Weinberg engaged in a series of intentional, wrongful acts including . . . defaming plaintiff, interfering with plaintiff's business venture, and making false and unfounded representations concerning plaintiff's integrity and character to prospective lenders . . . ." (Complaint ¶13) As a result of Weinberg's defamatory misrepresentations, plaintiff was allegedly unable to obtain financing to complete the casino project.

The gravamen of plaintiff's claim against the United States is that the "FBI had a duty to control the conduct of Weinberg so as to

prevent him from causing injury to Guccione . . . ." (Complaint ¶17) Plaintiff claims that the "FBI breached that duty by failing to use requisite care in selecting, training, instructing, supervising and controlling Weinberg in his role as agent for 'Abdul Enterprises,'" and that plaintiff was injured as a proximate result of this negligence.

b. Discussion

The United States is immune from suit absent an express waiver of its sovereign immunity. United States v. Testan, 424 U.S. 392, 399 (1976). Absent such a waiver, the federal courts are without subject matter jurisdiction to entertain a suit against the United States. Lamberston v. United States, 528 F.2d 441, 443 (2d Cir.), cert. denied, 426 U.S. 921 (1976).

The Federal Tort Claims Act waives the government's sovereign immunity for certain claims caused by the "negligent or wrongful act or omission" of a government employee. 28 U.S.C. §1346(b). The FTCA is only a limited waiver of immunity, however, and Section 2680 of the Act sets forth several categories of tort claims for which the United States has not waived its immunity. One of these, the "intentional torts exception" to the FTCA's waiver of immunity, 28 U.S.C. §2680(h), clearly bars plaintiff's claims in this suit.

Section 2680(h) provides that the United States' waiver of sovereign immunity under the FTCA shall not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contrary

rights."[1] (emphasis added). The Second Circuit has interpreted the clear language of the statute as barring all claims "arising out of" the enumerated intentional torts, regardless of whether the claims are pleaded forthrightly in terms of the intentional tort itself, or indirectly, as claims for negligent supervision of the intentional tortfeasor, or negligent failure to protect the victim from the intentional tortfeasor's harmful propensities. Miele v. United States, 800 F.2d 50 (2d Cir. 1986); Johnson v. United

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[1]The 1974 amendment to the intentional tort exception to the FTCA, 28 U.S.C. §2680(h), narrows the exception so as to permit claims against federal law enforcement officers "arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." The liberalization of the government's waiver of sovereign immunity is inapplicable in the present case, however, because the intentional torts complained of by plaintiff are in the nature of libel, slander, misrepresentation, deceit, and interference with contract rights, categories for which the United States preserved its immunity.

States, 788 F.2d 845 (2d Cir. 1986), cert. denied, 107 S.Ct. 315 (1986). See also United States v. Shearer, 473 U.S. 52, 55 (1985) (plurality opinion); Thigpen v. United States, 800 F.2d 393 (4th Cir. 1986); Satterfield v. United States, 788 F.2d 395, 399-400 (6th Cir. 1986); Garcia v. United States, 776 F.2d 116, 117-18 (5th Cir. 1985); Wine v. United States, 705 F.2d 366 (10th Cir. 1983); Naisbitt v. United States, 611 F.2d 1350 (10th Cir.), cert. denied, 449 U.S. 885 (1980).

As stated by the court in Miele,

> The intentional tort exception to the Act bars not only claims for assault and battery, but also any claim arising out of the assault and battery. "[I]t is inescapable that the phrase 'arising out assault [or] battery' is broad enough to encompass claims sounding in negligence." (citing United States v. Shearer, 105 S.Ct. at 3043.)
>
> Allowing claims against the government that are stated in negligence, but actually arise from an assault and battery would defeat Congress' purpose to bar

> suits against the government for injuries caused by a government employee's commission of assault and battery. (citing Johnson v. United States, 788 F.2d 845, 850 (2d Cir. 1986)).

Miele v. United States, 800 F.2d at 52 (2d Cir. 1986) (emphasis in original).

The Second Circuit's reasoning in Johnson was equally broad and explicit:

> It is . . . clear that the claim here is for injuries caused by the employee's assault and battery and that, absent the assault and battery, no claim could exist . . . . To permit such a claim to be stated in terms of a negligence theory . . . would defeat Congress' purpose in enacting §2680(h). The claim, although stated in terms of negligence, would still be for injuries caused by and arising out of the assault and battery.

Johnson v. United States, 788 F.2d at 850-51 (2d Cir. 1986) (emphasis in original) (citations omitted).

In the present case, plaintiff alleges that he suffered injuries in excess of four million dollars caused by the defamatory misrepresentations and other wrongful acts of FBI operative Melvin Weinberg. Plaintiff also alleges the actual participation of FBI agents in Weinberg's various intentional torts by virtue of their "cooperation, assistance and/or direction" in Weinberg's activities. (Complaint ¶11) In the face of the FTCA's unambiguous refusal under 28 U.S.C. §2680(h) to recognize claims for intentional torts, however, plaintiff's theory of government liability is that the FBI was negligent in its selection, training and supervision of Weinberg. (Complaint ¶18)

There can be no question, from the clear language of plaintiff's complaint, that Guccione's claims arise out of the alleged intentional torts of both Weinberg and the

FBI's own agents. Thus, regardless of whether they are pleaded as claims grounded in the intentional torts themselves, or as claims against the FBI for its alleged negligent supervision and control of Weinberg, Guccione's claims are barred by the intentional torts exception to the FTCA, §2680(h), and by the Second Circuit's broad and logical interpretation of this section in Miele and Johnson.

Plaintiff has argued that his claims are not barred by §2680(h) or by holdings in Johnson and Miele because Weinberg was not an official government employee at the time he committed the intentional torts of which plaintiff here complains. Plaintiff contends that although under current Second Circuit laws the United Stats could not be liable for the negligent supervision of Weinberg had he been a formal government employee, because

Weinberg was a mere "informant" or "operative" of the FBI, see Complaint ¶5, the government may indeed be liable for injuries arising out of Weinberg's intentional torts by virture of FBI negligence in supervising and controlling him. Guccione relies primarily on the case of Panella v. United States, 216 F.2d 622 (2d Cir. 1954) for this proposition.

In Panella v. United States, 216 F.2d 622 (2d Cir. 1954), the Second Circuit held that the intentional tort exception to the FTCA did not bar claims arising out of the intentional torts of third parties in the government's custody or control where the injury was attributable to a federal employee's negligent supervision of the tortfeasor. Panella involved an assault by one prisoner on another prisoner in a hospital prison, allegedly caused by the government's failure to provide adequate guards and otherwise properly

supervise those confined in the institution. Id. at 623. Panella has been narrowly applied to permit a negligent supervision claim, despite the strictures of §26890(h), in a limited number of cases where the tortfeasor's conduct was in no way at government behest and where the essence of the tortfeasors' relationship with the government was precisely to be supervised. See Muniz v. United States, 305 F.2d 285 (2d Cir. 1962), aff'd, 374 U.S. 150 (1963) (assault by federal prison inmates on another inmate); Gibson v. United States, 457 F.2d 1391 (3d Cir. 1972) (attack on counsellor by mentally imbalanced drug addict enrolled in program at federal camp); Fleishour v. United States, 244 F. Supp. 762, 766 (N.D. Ill. 1965), aff'd, 365 F.2d 126 (7th Cir.), cert. denied, 385 U.S. 987 (1966) (assault by federal prisoner on another prisoner).

Plaintiff's suggestion that Panella should be applied to allow his claim for negligent supervision in this action on the grounds that Weinberg was a third party rather than a government employee is utterly without merit. Even if Weinberg's status as a federal employee within the meaning of the FTCA remains unclear,[2] according to plaintiff's own complaint Weinberg was no mere third party. Instead, Weinberg's ABSCAM activities are alleged to have been at the behest of the FBI and in furtherance of the FBI's own goals, for better or for worse. Furthermore, the context of Weinberg's ABSCAM operations, a context in which the essence of Weinberg's relationship with the FBI was to perform services, is in stark contrast to the situation dealt with in cases such as Panella where supervision or care of the intentional tortfeasor is the

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[2] See infra, pp.531-32.

whole reason for any relationship between the tortfeasor and the government in the first place. Thus, because the facts and the rationale of Panella are so entirely distinct from Guccione's situation, this case provides no support for plaintiff's attempt to bypass the intentional tort exception to the FTCA by pleading negligent supervision.

Guccione also appears to make a more general argument that his claim should not be barred by the intentional tort exception of the FTCA and by the Johnson and Miele holdings disallowing intentional tort claims in the guise of negligent supervision claims. Even without reference to Panella, argues plaintiff, simply because Weinberg was not formally a government employee Johnson and Miele do not bar Guccione's FTCA suit for negligent supervision of the intentional tortfeasor. This argument is unconvincing,

not only because the formal employee status of the tortfeasor is irrelevant under the broad "arising out of" holdings of Johnson and Miele, but also because it ignores relevant case law directly to the contrary, disregards explicit provisions of the FTCA itself, and leads to absurd results.

To begin with, the FTCA's definition of "employee" for purposes of the Act does not require that a person possess formal employee status. Rather, it includes any "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. §2671. See Witt v. United States, 462 F.2d 1261, 1263-64 (2d Cir. 1972); see also Logue v. United States, 412 U.S. 521, 526-28 (1973). Weinberg is alleged by plaintiff to have been "employed or otherwise engaged" by the FBI "to

assist in the [ABSCAM] investigation" and to have "rendered his services, including all acts complained of [in the complaint]" while so engaged. Although the ultimate determination of Weinberg's federal employee status is a factual one which is not properly addressed in this motion for judgment on the pleadings,[3] by the plain language of plaintiff's complaint, Weinberg's relationship with the FBI during his ABSCAM activities was either that of an employee within the meaning of the Act, or at least that of an independent

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[3]The liberal reading in a plaintiff's favor necesssarily accorded to a complaint on a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is less applicable in a motion to dismiss based on lack of subject matter jurisdiction. Indeed, in the context of a complaint brought under the FTCA, plaintiff is required to allege sufficient independent facts to withstand any potential bars to the court's subject matter jurisdiction. The court must "look beneath the language of the complaint to determine the substance of the claim." Johnson v. United States, 788 F.2d 845, 854 (2d Cir. 1986) (citations omitted).

contractor. See Logue v. United States, 412 U.S. 521, 527-28 & n.5 (1973) (an independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking).

If Weinberg were ultimately found to have been an employee for FTCA purposes under the broad definition set forth in the statute, see Socialist Workers Party v. Attorney General of the United States, 642 F.Supp. 1357, 1423 (S.D.N.Y. 1986) (FBI informants held to be employees for purposes of FTCA), then plaintiff's contention in this motion that he is entitled, notwithstanding Miele and Johnson, to make a negligent supervision claim because Weinberg was not officially a government employee would fall fatally flat.

If, on the other hand, Weinberg were found to have been an independent contractor, see Slagle v. United States, 612 F.2d 1157, 1159-61, 1163 (9th Cir. 1980) (informant may be an independent contractor within the meaning of the FTCA), then case law and common sense make it apparent that plaintiff could not make out a cause of action against the government for the intentionally tortious defamatory acts of this individual who, as an independent contractor, was beyond the FBI's right of control. See United States v. Orleans, 425 U.S. 807, 814-15 (1976); Logue v. United States, 412 U.S. 521, 525-27 (1973). It defies logic that the United States could be held liable, via a theory of negligent supervision, for the intentional torts of non-employee, independent contractor FBI

operatives, even while it could not be held liable for negligent supervision of its own employees who committed intentional torts.

Finally, regardless of the label that is applied to Weinberg's employment relationship with the FBI, all circuits that have considered the matter have held that the intentional tort exception of the FTCA covers intentional torts by informants or undercover operatives and that this limitation cannot be circumvented by allegations that these individuals were negligently supervised or controlled. Boda v. United States, 698 F.2d 1174 (11th Cir. 1983); Leaf v. United States, 661 F.2d 740 (9th Cir. 1981), cert. denied, 456 U.S. 960 (1982); Redmond v. United States, 518 F.2d 811 (7th Cir. 1975). Furthermore, although the Second Circuit has never directly ruled on the applicability of the intentional torts exception to undercover informants or

operatives, in Johnson v. United States, where the court unambiguously announced its broad interpretation of the "arising out of" language of the §2680(h), it also explicitly rejected the reasoning of the major case relied on by plaintiff herein for the proposition that intentional torts by undercover operatives may be actionable on a theory of negligent supervision, Liuzzo v. United States, 508 F. Supp. 923 (E.D. Mich. 1981). Johnson v. United States, 788 F.2d 853 n.8 (2d Cir. 1986).[4]

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[4] Liuzzo v. United States, 508 F. Supp. 923 (E.D. Mich. 1981), and the related district court case of Bergman v. United States, 565 F. Supp. 1353 (W.D. Mich. 1983), in allowing claims based on the government's alleged negligent supervision and negligent failure to warn with respect to certain violent undercover operatives, both clearly rejected the reasoning later set forth by the Second Circuit in Johnson and Miele in disallowing such claims. Both Liuzzo and Bergman concluded that the intentional tort exception to immunity created by §2680(h) should not be applied "[w]hen injuries directly resulting from assaults and batteries may be reasonably

(footnote continued)

In conclusion, and notwithstanding plaintiff's strained argument that he has stated a cognizable claim against the government for its negligent supervision and control of Melvin Weinberg, Guccione's claim for injuries allegedly sustained with respect to his Atlantic City casino project

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(footnote continued from previous page) alleged to have their roots in negligence." Bergman, 565 F. Supp. at 1411 (citing Liuzzo at 928-29).

Moreover, without deciding whether the informant tortfeasors were or were not employees within the meaning of the FTCA, in holding that the government could be liable by reason of its alleged negligent supervision, Liuzzo explicitly and emphatically rejected the significance of the intentional tortfeasor's employment status. 508 F. Supp. at 930. Thus, Guccione's attempt to circumvent Miele and Johnson by relying on the employment status of Weinberg is at odds with the principal case relied on by plaintiff himself. In fact, Liuzzo achieves the result advocated by plaintiff in this motion -- permitting a claim for the government's negligent supervision of an intentional tortfeasor -- only by its wholehearted rejection of the broad "arising out of" interpretation of §2680(h) which controls in this Circuit.

unquestionably arose out of the alleged intentional torts of a government operative, and thus falls within the FTCA's intentional tort exception to the United States' waiver of sovereign immunity. Accordingly, this court having no subject matter jurisdiction over plaintiff's claim, it is dismissed in its entirety.

Statute of Limitations

Plaintiff's failure to file the present lawsuit within the applicable statute of limitations provides an adequate and independent basis for dismissal of this action. Based on factual material in the form of news clippings and letters from plaintiff's own files, and other public information that was widely and prominently reported in the New York and national press, it is beyond dispute that plaintiff knew of should have known the critical facts of his claim by at least March

1982, if not well before that. Thus, plaintiff's initiation of this action on November 28, 1984 was unquestionably untimely under the applicable two year statute of limitations.

a. Facts

It is undisputed that plaintiff's dealings with Melvin Weinberg as a representative of "Abdul Enterprises," from which the injuries complained of herein are said to have arisen, occurred in late 1978 and early 1979. Plaintiff met or spoke with Weinberg during this time on at least three separate occasions to discuss prospective financing for Guccione's casino project. Weinberg, who used his own name, also suggested on these occasions the possibility of securing a casino license through corrupt means. According to plaintiff's complaint, the FBI's negligent supervision and control of

Weinberg made it possible for Weinberg surreptitiously to defame Guccione to potential lenders and otherwise interfere with his business projects. According to plaintiff's complaint, Weinberg's defamatory tactics caused crucial lenders to shy away, resulting in vast financial injury to plaintiff.

The FBI's ABSCAM investigation resulted in several highly publicized indictments and trials of prominent individuals in 1980 and 1981. When the FBI's undercover tactics during the course of the ABSCAM investigation, and particularly its use of Melvin Weinberg as an operative, were revealed, they became the object of extensive debate and criticism in the media. The controversy regarding the FBI's conduct of ABSCAM resulted in an investigation by the United States Senate,

which in turn resulted in the publication of a report by a select committee of the Senate in January 1983.[5]

Plaintiff initiated the present action on November 28, 1984 by presenting an administrative claim to the FBI.[6] Thus, in

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[5] Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice to the United States Senate, S. Rep. No. 682, 97th Cong., 2d Sess. (1982) (ordered to be printed December 15 (legislative day November 30), 1982)).

[6] Plaintiff filed an initial administrative claim seven months earlier on July 18, 1984 which was rejected by the agency because it did not contain a "sum certain" of alleged damages. It is well estabished that the statement of a "sum certain" in the administrative complaint is a jurisdictional prerequisite to any claim under the Federal Tort Claims Act. See, e.g., Allen v. United States, 517 F.2d 1328 (6th Cir. 1975); Cooper v. United States, 498 F.Supp. 116, 118 (W.D.N.Y. 1980); Miller v. United States, 418 F.Supp. 373 (D. Minn. 1976); College v. United States, 411 F.Supp. 738 (D. Md. 1976), aff'd. 572 F.2d 453 (2d Cir. 1978); Fallon v. United States, 405 F.Supp. 1320 (D. Mont. 1976). See also Lotrionte v. United States, 560 F.Supp. 41 (S.D.N.Y. 1983), aff'd. 742 F.2d 1436 (2d Cir. 1983). Thus, there appears to have been nothing improper or out of the ordinary about

(footnote continued)

order for his claim to have been timely under the FTCA's two year statute of limitations, it must have accrued no earlier than November 1982.

Plaintiff contends that his claim did not accrue until January 1983 when the publication of the Senate Report on ABSCAM alerted him for the first time to the critical facts of the injury he had suffered in the late 1970's as a result of the FBI's undercover operation. In determining when plaintiff knew or should have known, however, the critical facts of his alleged injury,[7] the court must also consider

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(footnote continued from previous page) the agency's rejection of plaintiff's initial complaint. In any event, as discussed below, even if the July 1984 filing had been accepted, it would still not have been within the two year limitations period which began running clearly no later than March 1982.

[7]As discussed infra, pp. 535-36, the date on which Guccione either knew or reasonably should have known the critical facts of his alleged injury provides the most liberal accrual date potentially available to him on the claims asserted herein.

the following indisputable facts as to information about ABSCAM that was publically available, and indeed known to plaintiff, far earlier than the publication of the Senate's Report.

The extensive press coverage arising out of the ABSCAM indictments and trials made the existence of this notorious FBI investigation a matter of public knowledge by 1980. ABSCAM's focus on the Atlantic City gambling industry, and its use of Melvin Weinberg as a representative of "Abdul Enterprises" were prominently reported. Defendant's Exhibits J, K, L, M, N, O, P and Q. (More than 20 news articles published during 1980 in various newspapers and magazines, including all four major New York City dailies; Exhibits N, O and P, regarding the trial and conviction of one of the ABSCAM defendants are from plaintiff's own files of news clippings.)

By 1981 it is clear that plaintiff also knew he was a potential target of the ABSCAM investigation. There was extensive press coverage of the fact that the FBI had been interested in Guccione's potentially illegal Atlantic City activities during the ABSCAM investigation. Defendant's Exhibit O, P (several news articles dating from 1980 and 1981, including one in the New York Times, discussing a recently unsealed 1979 affidavit of a government prosecutor linking Guccione with ABSCAM targets). See also, e.g., Defendant's Exhibits R, U, CC (1981 press coverage implicating Guccione and his buisness ventures in the ABSCAM scandal). Several of these articles were discovered during the course of the present litigation in plaintiff's own files of news clippings.

There was also press coverage, during and even prior to 1981, of the reactions of plaintiff and his lawyer, Norman Roy Grutman, to these reports implicating Guccione in the 1979 ABSCAM investigation. An Associated Press Story dated September 6, 1980 quotes Grutman a saying that the allegations were "utterly shocking." Defendant's Exhibit O at p.3. Another Associated Press syndicated story dated January 19, 1981 reported the reactions of Guccione, himself, as follows:

> Penthouse magazine publisher Robert Guccione says a key Abscam operative offered to arrange a multimillion-dollar loan for Guccione's Atlantic City casino project if the publisher bribed the chairman of the New Jersey Casino Control Commission.
>
> "They wanted to create corruption," Guccione said in a weekend interview with The Associated Press. "It didn't make sense to me what they were up to, but now it's all clear."

This January 19, 1981 story, Defendant's Exhibit R, pp.3-4, a copy of which was discovered in plaintiff's clippings files, continued by reporting Guccione's version of his contacts with Melvin Weinberg in 1979.

Another critical element of plaintiff's claim against the government in this lawsuit is the specific injury allegedly suffered, i.e., that the FBI's conduct of ABSCAM had the effect of obstructing Guccione's ability to obtain crucial financing for his casino project. Press coverage, including statements from Guccione, and material from plaintiff's own files indicate his actual awareness that his implication in ABSCAM had had such an effect. See Defendant's Exhibit V (Wall Street Journal article dated Feb. 15, 1980 assessing the effect of ABSCAM and quoting Guccione on the investigation's adverse effect on financing availability). See also

Defendant's Exhibits W, X (February and September 1980 letters from financial institutions regarding the damage to plaintiff's financing efforts caused by ABSCAM.) A September 27, 1980 letter concerning the casino's financing problems, Defendant's Exhibit X, which clearly came to Guccione's direct attention,[8] is particularly noteworthy for the following statement: "There are also grave rumors of huge debts incurred by you . . . and of course Abscam and organized crime connections." Defendant's Exhibit X.

A final category of information crucial to the FTCA claim that plaintiff has made in this lawsuit[9] is information regarding the

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[8]Attached to this letter discovered in plaintiff's files was a cover memo addressed to a Guccione aide that stated, "Mr. Guccione asked that I send a copy of the attached correspondence to you."

[9]The court has already ruled, of course,
(footnote continued)

FBI's manner of supervising and controlling Melvin Weinberg, the undercover operative who allegedly stymied Guccione's casino financing efforts. It is beyond dispute that well before March 1982, Guccione was fully aware that the FBI's handling of Weinberg was extraordinarily flawed. An article in plaintiff's own publication, Penthouse Magazine, regarding the FBI's conduct of ABSCAM states in pertinent part:

> Weinberg became an unguided missile for the FBI. In flagrant violation of the bureau's own rules for the handling of informants -- rules that require FBI agents to keep a constant, careful record of what is informants do and say as they pursue their prey -- Weinberg filed no reports, and the agents responsible for him kept few if any written records. Accordingly, fast-

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(footnote continued from previous page) earlier in this opinion, that plaintiff's claim against the FBI for negligence in its supervision of Weinberg is barred by sovereign immunity and must be dismissed in any event.

> buck Mel was free to use unconstitutional means to bag his game.

Defendant's Exhibit Y at p.1 (September 1981 Penthouse Magazine article by Nat Hentoff). Other articles and columns, including a series of nationally syndicated columns by Jack Anderson, expressing similar outrage over the FBI's unaccountable relationship with Weinberg and its overall lax handling of the investigation appeared prominently in the national press. See Defendant's Exhibits Z, AA (including New York Times, Christian Science Monitor, and Newsday, etc., articles from between May 1981 and March 1982). A May 1981 Newsday story reporting that "[s]ome members of Congress . . . have accused the FBI of inadequate control over informants and middlemen in the probe," Defendant's Exhibit AA, and a March 1982 Christian Science Monitor piece recounting Senator Alan Cranston's

charges "that the chief undercover operator, convicted con-man Mel Weinberg, 'was totally out of control' in Abscam," Defendant's Exhibit AA, are typical.

b. Discussion

Title 28 U.S.C. §2401(b) provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ." The general rule for accrual of an FTCA claim is that accrual occurs at the time that the injury or harm is inflictd. See Barrett v. United States, 689 F.2d 324, 327 (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983). Applying this most commonly applicable FTCA accrual rule, the accrual of Guccione's claim would have been in 1979 when he was allegedly injured by Weinberg's defamatory activities and the FBI's negligent supervision of this

individual. There would be no question were this accrual standard to be applied that Guccione's 1984 filing was untimely.

In exceptional FTCA cases, however, for example in medical malpractice actions where plaintiff's injury may be "unknown" or "inherently unknowable" at the time it occurs, the application of a diligence-discovery rule of accrual may be applied. United States v. Kubrick, 444 U.S. 111 (1979); Barrett v. United States, 689 F.2d at 327. This special rule of accrual may also be applied where it has been shown that the plaintiff was blamelessly ignorant of his claim due to the government's deliberate concealment of its facts. Barrett v. United States, 689 F.2d at 327.

The diligency-discovery rule of accrual provides that accrual may be postponed until the plaintiff has or with reasonable diligence

should have discovered the "critical facts" of his claims. Barrett v. United States, 689 F.2d at 327. Possession of the "critical facts" of a claim means knowledge of or knowledge that could lead to, the basic facts of the injury, i.e., knowledge of the injury's existence and knowledge of its cause or of the person or entity that inflicted it. See United States v. Kubrick, 444 U.S. 122; Barrett v. United States, 689 F.2d at 328. In order for a claim to accrue under the diligence discovery rule, a plaintiff need not know each and every relevant fact of his injury or even that the injury implicates a cognizable legal claim. United States v. Kubrick, 444 U.S. 111 at 122. Rather, a claim will accrue when the plaintiff knows, or should know, enough of the critical facts of injury and causation to protect himself by seeking legal advice. Kubrick at 122-25, Lee

v. United States, 485 F. Supp. 883, 886 (E.D.N.Y. 1980). Whether a plaintiff "should have known" these critical facts even if he did not actually know them, is decided by reference whether a reasonable person exercising due and reasonable diligence would have discovered such facts. See Barrett v. United States, 689 F.2d at 330.

Whether the exceptional diligence-discovery rule of accrual for an FTCA claim is triggered is a factual question. In the present case, in order for this rule to apply, plaintiff has the burden of proving that there was some deliberate attempt by the government to conceal the critical facts of his claim. Although in his complaint plaintiff has not even pleaded such allegation, he has argued it on this motion. While given the context of the alleged injury here the FBI's interest in concealment does not seem at all unlikely,

this ultimate determination cannot be made on this motion. The disputed issue of material fact as to whether there was active FBI concealment, however, does not preclude a grant of summary judgment in this action. Assuming, arguendo, that the more generous discovery rule of accrual had in fact been triggered by the government's active concealment, it is still beyond dispute that plaintiff knew or should have known by at least March 1982 the critical facts of the claim here asserted.

Extensive press coverage of the ABSCAM trials and the ABSCAM controversy in general, dating from 1980 to early 1982, much of which was contained in plaintiff's own news clipping collection, revealed the critical facts that Guccione had been of interest to the FBI in connection with the investigation and that Melvin Weinberg had been one of its key

operatives. The outrageousness of Weinberg's techniques and the shocking laxness of the FBI's supervision of this individual had both been extensively criticized in the press. Guccione knew that rumors about him arising out of ABSCAM had seriously hampered his ability to obtain casino financing. By well before March 1982 Guccione knew that his dealings with Weinberg in late 1978 and 1979 had not been any ordinary business contacts but were wholly a product of FBI scheming. These facts were more than enough to alert him to the claim he sets forth in the present lawsuit.

Guccione argues that his claim did not accrue until the publication of the Senate Report in January 1983 because he did not know and could not have discovered certain specific details of his present allegations regarding Weinberg's intentionally tortious activities

in 1979 and the FBI's failure to oversee Weinberg properly. The court rejects this argument. The diligence discovery rule does not preclude a claim from accruing until a plaintiff has actual access to every detail of his alleged injury and to information alerting him to every possible legal theory of recovery to which his injury might give rise. Because the information regarding Guccione in the Senate Report is largely duplicative, though it provides greater detail, of information that had already been a matter of public knowledge by early 1982, the Senate Report's publication cannot supply plaintiff with his desired later accrual date.

To the extent that Guccione contends that prior to the publication of the Senate Report he did not have sufficient information to make the specific allegations he has asserted in this action, i.e., that in the late 1970's

Weinberg defamed him to prospective lenders, it is extremely noteworthy that the Senate Report makes no reference to any such prospective lenders. Indeed, plaintiff's counsel has stipulated to this fact. Defendant's Exhibit E, pp. 89-92. Thus, even if plaintiff could point to any factual basis for this detail of his allegations, and even if this detail were critical to plaintiff's cause of action herein, Guccione could not rely on the Senate Report to provide a late accrual date for his tort claim against the United States. In any event, the inferences and legal theories at the basis of the present lawsuit that Guccione argues became possible only with the appearance of the Senate Report -- specifically those allegations regarding Weinberg's defamatory remarks to lenders -- are clearly inferences that any reasonable

person could have made from the ample public information available to and known by plaintiff well before March 1982.

The question whether an FTCA plaintiff knew or should have known the critical facts of his claim, and the subsidiary question of whether he exercised due diligence to discover them are ordinarily matters for the finder of fact to determine at trial. See Barrett v. United States, 689 F.2d 330. However, where, as in the present case, it is beyond dispute that plaintiff should have known and, indeed, actually knew the critical facts of his claim, summary judgment is appropriate.

The outrage expressed in the 1983 Senate Select Committee Report at the FBI's handling of the ABSCAM investigation, and particularly its distress with Melvin Weinberg's conduct during ABSCAM and with the targeting of individuals such as Guccione, might help to

make plaintiff's claims against the government in this action sympathetic ones were the legally cognizable. However, it is beyond dispute that even applying the most liberal judicial interpretation of the Congressionally mandated two year statute of limitations for FTCA claims, plaintiff's lawsuit is untimely. Plaintiff cannot rely on Congressional censure of FBI activities in ABSCAM to excuse his own clear procedural default as to any ABSCAM related claims against the government that he once, conceivably, may have had.

Conclusion

In accordance with the foregoing, defendant's motion for judgment on the pleadings on the grounds of sovereign immunity is granted. Defendant's alternate motion for summary judgment is also granted, the court having found that even under the most liberal statute of limitations rule potentially

available to plaintiff on his FTCA claim, this claim has not been timely made. Accordingly, this action is dismissed in its entirety.

Dated: New York, New York
September 10, 1987

CONSTANCE BAKER MOTLEY
U.S.D.J.

No. 89-553

In the Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT C. GUCCIONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The complaint in this case alleges that an FBI operative committed intentional torts while he was "employed or otherwise engaged" by the FBI, and that "all acts complained of" constituted "services" he "rendered" to the United States "under the control and supervision of the FBI and its special agents." The question presented is whether the "intentional tort exception" to the Federal Tort Claims Act, 28 U.S.C. 2680(h), bars a claim for negligent supervision of that operative.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A18) is reported at 847 F.2d 1031. The opinion of the court of appeals issued upon denial of rehearing (Pet. App. A19-A21) is reported at 878 F.2d 32. The opinion of the district court (Pet. App. A22-A68) is reported at 670 F.Supp. 527.

JURISDICTION

The court of appeals' judgment was entered on May 26, 1988, and a petition for rehearing was denied on July 6, 1989 (Pet. App. A1-A2). The petition for a writ of certiorari was filed October 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Because the district court ruled on the basis of the pleadings, the allegations of the complaint must here be taken as true. The complaint alleges that in the late 1970s, Melvin Weinberg, as the FBI's central operative in the ABSCAM investigation, committed a series of intentional torts against petitioner in the course of that investigation. Those alleged torts include defamation, misrepresentation, and interference with contract rights (Compl. ¶¶ 4, 13, C.A. App. 9, 10-11). In particular, petitioner alleged that the FBI, through Weinberg, attempted to induce him to commit crimes in connection with his efforts to open a gambling casino in Atlantic City. Petitioner claims that when he rebuffed these attempts, Weinberg embarked on a campaign of intentional torts designed to induce such crimes. Thus, it is alleged that "Weinberg engaged in a series of intentional, wrongful acts including * * * defaming [petitioner], interfering with [petitioner's] business venture [the proposed casino], and making false and unfounded representations concerning [petitioner's] integrity and character * * * " (Compl. ¶ 13, C.A. App. 10-11).

The complaint further alleges that Weinberg committed those torts while "employed or otherwise engaged" by the FBI as an FBI "operative" on an ongoing basis, and that all his alleged acts constituted "services" he "rendered" to the United States (Compl. ¶ 5, C.A. App. 9; see also Compl. ¶¶ 8, 11-13, C.A. App. 9, 10-11). In addition, Weinberg's supervising FBI agents are alleged to have participated in Weinberg's torts, in that he allegedly acted with their full knowledge, cooperation, assistance, and direction (Compl. ¶¶ 8, 11, 13, C.A. App. 9, 10-11).

As a proximate result of these intentional torts, it is alleged, petitioner was unable to secure sufficient loans to complete his partially constructed gambling casino, resulting

in losses in excess of $400 million (Compl. ¶ 14, C.A. App. 11).

2. The district court ruled against petitioner on two independent grounds: First, it dismissed the complaint on the basis that the action was barred by sovereign immunity under the intentional tort exception to the FTCA, 28 U.S.C. 2680(h) (Pet. App. A25-A46). Although petitioner's claims were pleaded in negligence, the court held that they were claims "arising out of" the alleged intentional torts of the FBI operative and were therefore barred by the intentional tort exception. In its view, the factual question whether Weinberg technically was an "employee" of the federal government did not have to be resolved, because "by the plain language of [petitioner's] complaint, Weinberg's relationship with the FBI during his ABSCAM activities was either that of an employee within the meaning of the [FTCA], or at least that of an independent contractor" (*id.* at A40-A41), and in either case relief would be barred. "Finally, regardless of the label that is applied to Weinberg's employment relationship with the FBI, all circuits that have considered the matter have held that the intentional tort exception of the FTCA covers intentional torts by informants or undercover operatives and that this limitation cannot be circumvented by allegations that these individuals were negligently supervised or controlled" (*id.* at A43 (citing cases)).

Second, the district court granted summary judgment for the government on the independent ground that the action was time-barred (Pet App. A46-A47): "[I]t is beyond dispute that [petitioner] knew [or] should have known the critical facts of his claim by at least March 1982, if not well before that. Thus, [petitioner's] initiation of this action on November 28, 1984 was unquestionably untimely under the applicable two year statute of limitations" (*ibid.*). "[E]ven under the most liberal statute of limitations rule poten-

tially available to [petitioner] on his FTCA claim, this claim has not been timely made" (*id.* at A67-A68).

3. The court of appeals affirmed on sovereign immunity grounds, finding it unnecessary to reach the statute of limitations issue (Pet. App. A18). The court first recognized that the "negligent supervision" claim is a familiar pleading device for plaintiffs attempting to evade the reach of the intentional tort exception, one that the Second Circuit as well as others have consistently rejected (*id.* at A9-A10 (citing cases)). The court then rejected petitioner's attempt to avoid the reach of those decisions. The court agreed with the district court that it was unnecessary to determine whether Weinberg was technically an employee of the United States, because it was undisputed that he had some relationship with the United States and "was certainly acting on the Government's behalf as an undercover operative carrying out the Abscam investigation. The language of [petitioner's] complaint itself furnishes a sufficient basis for barring his claim * * * : '[T]he FBI employed or otherwise engaged Melvin Weinberg to assist in the [Abscam] investigation as an informant and operative, and Weinberg rendered his services, including all acts complained of herein, while under the control and supervision of the FBI and its special agents' "(Pet. App. A16 (quoting Compl. ¶ 5) (brackets in original).

The court also found inapplicable the evolving "independent affirmative duty" exception to the intentional tort exception: "The mere fact that Guccione was the subject of an undercover investigation by the FBI gave rise to no special 'affirmative duty' to protect Guccione independent of the Government's duty to supervise its agents" (Pet. App. A17). To find such a duty in every case in which the government carries out its basic functions "would create an exception that would swallow the rule of section 2680(h)" (*ibid.*). "The present case is not one in which a plaintiff has been placed in the care or custody of the Government and

thereafter suffers harm as a result of the negligent performance of a duty of protective care that the plaintiff was entitled to rely upon," and so "[w]hatever the ultimate contours of the affirmative duty doctrine, it is unavailable to Guccione under the circumstances of this case" (*id.* at A17-A18).

4. Petitioner filed a petition for rehearing, relying on this Court's decision in *Sheridan* v. *United States*, 108 S. Ct. 2449 (1988), which was decided after the court of appeals' initial decision. The court, in a brief opinion denying the petition (Pet. App. A19-A21), held that *Sheridan* does not require a different result. In *Sheridan*, the tortfeasor-assailant's employment status "ha[d] nothing to do with the basis for imposing liability on the Government" (108 S.Ct. at 2455), and so the alleged negligence of three naval corpsmen in permitting him to leave a naval hospital with a weapon in his possession was "entirely independent of [the assailant's] employment status" (*ibid.*). Here, by contrast,

> Weinberg's role in relation to the United States is at the heart of Guccione's claim. * * * [T]he only duty possibly owed to Guccione by the Government agents with responsibilities for the Abscam investigation was to exercise reasonable care in the supervision of those persons acting in some way to carry out the governmental objectives of that investigation. Weinberg, unlike the assailant in *Sheridan*, was carrying out the Government's business during the episode in which he allegedly injured the tort plaintiff, even though he may have exceeded the bounds of proper conduct in the particular way he chose to carry out his assignment. Any negligent supervision * * * is not "entirely independent" of the relationship between Weinberg and the United States, whether or not Weinberg's status was technically that of an "employee." * * *

Pet. App. A20-A21.

ARGUMENT

There are two issues raised by this case. The first is whether Weinberg was an "employee of the Government" for purposes of the application of the Federal Tort Claims Act. This issue does not warrant review by this Court, because petitioner's own allegations that the government "controlled and supervised" Weinberg with respect to "all acts complained of" strongly support the conclusion, to which petitioner cites no contrary authority, that Weinberg should be treated as an employee for FTCA purposes. In any event, the question whether such treatment is appropriate is at most a question about the application of the statutory definition of "employee of the government" to the particular and unusual facts pleaded in this complaint. That question does not warrant this Court's review.

The second issue is whether, if Weinberg is to be treated as an "employee of the government" for FTCA purposes, petitioner's "negligent training and supervision" claim is barred by the intentional tort exception to the FTCA. To the extent that this issue was unresolved in *Sheridan*, this case presents an unsuitable vehicle for reaching it because of the presence here of the fact-bound disagreement between the parties concerning whether Weinberg is an employee of the government for purposes of the FTCA. In addition, it would be appropriate to permit the lower courts to apply the *Sheridan* framework in a variety of factual circumstances before concluding that review of this question by this Court is necessary.[1]

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[1] To date, no court of appeals has ever held, in a case involving an intentional tort in which "all acts complained of" constituted "services" "rendered" by an operative to the government (Compl. ¶ 5, C.A. App. 9), that the government could be held liable for negligent training or supervision of the operative.

1. Petitioner in this case pleaded what the court of appeals termed a "mixed" claim of intentional tort (by Weinberg) and negligent training and supervision (by Weinberg's supervisors) (Pet. App. A9). *Sheridan* v. *United States*, 108 S.Ct. 2449 (1988), teaches that the first step in determining whether such a claim is barred by the intentional tort exception to the FTCA is to decide whether, absent the exception, the intentional tort claim itself would fall within the FTCA's waiver of sovereign immunity. As the *Sheridan* Court stated, if the alleged intentional tort "could not provide the basis for a claim under the FTCA, the exception could not apply" (*id.* at 2455).

a. A critical issue concerning the applicability of the FTCA—absent the exception—to the intentional torts alleged in this case concerns the status of Weinberg (the alleged intentional tortfeasor) as government employee. The basic waiver of sovereign immunity in the FTCA applies to claims "for injury or loss of property * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 1346(b). In turn, the Act provides that "employee of the government" includes "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. 2671. Thus, unless the alleged tortfeasor was acting as an employee pursuant to this definition, the claim could not come within the coverage of the FTCA.

Although the court of appeals did not squarely rule on this issue, it did say that Weinberg "was certainly acting on the Government's behalf as an undercover operative" (Pet. App. A16). And the complaint in this case provides ample support for the conclusion that Weinberg should be treated as an "employee of the Government" for purposes of the FTCA. In the terms of the complaint, Weinberg "rendered

his services, including all acts complained of herein, while under the control and supervision of the FBI," while "employed or otherwise engaged" by the FBI (Compl. ¶ 5, C.A. App. 9). He "posed as the agent of a fictitious * * * company * * *, at the direction * * * of the FBI" (Compl. ¶ 8, C.A. App. 9), and he "undertook to persuade plaintiff to commit illegal acts" while "acting * * * with the full knowledge, acquiescence, support, cooperation, assistance, and/or direction of his supervising FBI agents" (Compl. ¶ 11, C.A. App. 10). Cf. *Logue* v. *United States*, 412 U.S. 521 (1973) (relevance of control test under FTCA).

b. In the face of his own straightforward allegations, relied upon by both courts below, petitioner asserts that "on this record, it must be assumed that Weinberg was not an employee of the United States government" (Pet. 26). Petitioner cites no authority in support of this proposition, nor does he make any effort to demonstrate why the definition of "employee of the Government" in 28 U.S.C. 2671 would not apply to the facts as he pleaded them. Instead, he simply cites statements made by the government in another case, a case to which he was not a party and in which the definition found in 28 U.S.C. 2671 was not at issue (Pet. 2 n.1).[2] In short, petitioner advances no argument in support of his contention that Weinberg was not an employee under the FTCA or that the application of the controlling legal

[2] The statement cited by petitioner was made in a case in which Weinberg claimed he was entitled to additional compensation as a government employee for his services in connection with the Abscam cases. C.A. App. 94-95. The government attorney in that case made the cited statement while arguing that the controlling statute was 5 U.S.C. 2105, a statute that defines "employee" as an individual who was, *inter alia*, "appointed in the civil service" by certain specified individuals and "subject to the supervision of" one of those individuals. The definition in 5 U.S.C. 2105, which differs dramatically from the definition in 28 U.S.C. 2671, has no relevance to petitioner's claim.

standard to the unusual facts of this case, as pleaded in his complaint, warrants review by this Court.

2. Congress excluded from the limited waiver of sovereign immunity in the Federal Tort Claims Act "[a]ny claim arising out of * * * libel, slander, misrepresentation, deceit, or interference with contract rights" (28 U.S.C. 2680(h)).[3] Ever since the Act was passed, however, litigants have attempted to circumvent its exceptions by alleging that the harm was caused not by an act for which sovereign immunity remained a bar, but rather by antecedent negligence. These attempts have generally failed, because the courts have looked to the essence of the claim rather than the way it was framed in the complaint. See cases cited at Pet. App. A8-A10. See also *United States* v. *Shearer*, 473 U.S. 52, 54-57 (1985) (plurality opinion); *Hughes* v. *United States*, 662 F.2d 219 (4th Cir. 1981).

a. "[A]ll acts complained of" here arose out of intentional torts committed by an FBI operative alleged in the complaint to have been "employed or otherwise engaged" to assist in an FBI investigation. Furthermore, these acts were alleged to be part of the "services" he rendered to the United States (Compl. ¶ 5, C.A. App. 9). Accordingly, this case is on a par with the numerous cases in which the courts have rebuffed attempts to transform clearly-barred *respondeat superior* claims into non-barred "negligent supervision" claims.

b. As the court of appeals held, the result in this case is not called into question by the reasoning or result in *Sheridan*. In stark contrast to the allegations of this com-

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[3] The 1974 amendment limiting the reach of the intentional tort exception for certain other intentional torts, like assault and battery, committed by law enforcement officers is inapplicable here, because the torts complained of do not come within the terms of the amendment (Pet. App. A30 n.1).

plaint, the "off-duty, inebriated" employee in *Sheridan*, who shot and wounded passersby on a public street, was explicitly held to be "not acting within the scope of his office or employment" (108 S.Ct. at 2455). Moreover, the "good Samaritan" duty owed by the government in *Sheridan* had "nothing to do with" and was "entirely independent of" the intentional tortfeasor's status as an employee of the United States. *Ibid.* In contrast, Weinberg's relationship to the United States is critical and, based on petitioner's own allegations, is inextricably intertwined with the alleged tortious acts. Absent that relationship, there would be no basis for the claimed duty to supervise. Petitioner's claim merely reformulates, in the language of negligent supervision, a claim that is based directly on the alleged intentional torts of a federal operative functioning on the government's behalf. Such pleading artistry remains precluded by Section 2680(h), as it has been since the FTCA was adopted.

c. The decision in *Panella* v. *United States*, 216 F.2d 622 (2d Cir. 1954), cited by petitioner in support of his assertion that "mixed" claims are not barred by the intentional tort exception, in fact establishes precisely the opposite proposition in cases in which the intentional tortfeasor is an "employee of the Government" under the FTCA. In the *Panella* opinion, then-Judge Harlan discussed a hypothetical claim very much like that of petitioner, in which "a person is assaulted by a government employee who becomes angered about a matter within his jurisdiction" (*id.* at 624). He reasoned that "[s]ince in the absence of § 2680(h) the assault * * * might give rise to an action against the Government without any showing of negligence, it is not difficult to imply that the § 2680(h) exception was intended to exonerate the Government from all liability of this nature, no matter what the form of the action" (*ibid.*). The legislative history of the FTCA directly addresses the impact of the statute in a similar example; Congress was

informed by the Department of Justice that the intentional tort exception would apply where "some agent of the Government gets in a fight with some fellow * * * [a]nd socks him." *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 33 (1942), cited in *United States* v. *Shearer*, 473 U.S. 52, 55 (1985) (plurality opinion).

d. Petitioner asserts that the Second Circuit's decision in this case conflicts with decisions of the Ninth Circuit in three cases (Pet. 42-47). But none of those cases involved federal employees who rendered "services, including all acts complained of * * * [by the plaintiff], while under the control and supervision" of the government (Compl. ¶ 5, C.A. App. 9). In *Kearney* v. *United States*, 815 F.2d 535 (9th Cir. 1987), a soldier who had escaped from custody sexually abused and murdered a civilian. Unlike this case—and like *Sheridan*—the crime in *Kearney* plainly had nothing to do with the soldier's duties as government employee. The court noted, in a passage immediately following the passage quoted by petitioner (Pet. 45-46), that "[e]ven if Congress intended to distinguish between the imposition of liability for the government's negligence in its supervision of employees [and] the imposition of liability for the government's negligence in its supervision of nonemployees, imposition of liability is proper in this case because [the soldier's] status was that of a prisoner." 815 F.2d at 537. *Kearney* is thus much closer to *Panella* v. *United States*, *supra*, *United States* v. *Muniz*, 374 U.S. 150 (1963), and a line of other cases involving prisoners than to the present case. See also *Bennett* v. *United States*, 803 F.2d 1502, 1503 (9th Cir. 1986) (kidnap, assault, and rape of several children at Bureau of Indian Affairs boarding school by an off-duty teacher). The third case cited by petitioner, *Knappick* v *United States*, 875 F.2d 318 (9th Cir. 1989) (Table), is an unpublished opinion involving the special circumstances

raised when the victim of the tort is a prisoner dependent on the government for protection.

3. As both lower courts held, the Federal Tort Claims Act precludes the federal courts from exercising subject matter jurisdiction over petitioner's claim.[4] To a large extent, this holding was based on particular allegations made in petitioner's own complaint, and the question whether, in light of those allegations, Weinberg was an "employee of the Government" does not warrant review by this Court. Both on this point and on the issue of the applicability of the intentional tort exception to claims of negligent training and supervision of a government employee, the decision below is fully consistent with decisions of this Court and with the legislative history of the FTCA, and does not conflict with decisions of any other circuit. Accordingly, further review is not warranted.

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[4] Since petitioner's grievances have already been called to the attention of Congress and have been the subject of comment by a Senate Committee, Congress may be receptive to a request for enactment of a private bill compensating petitioner, if indeed justice so demands. See *Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice to the United States Senate*, S. Rep. No. 682, 97th Cong., 2d Sess. (1982), part F (duplicated at C.A. App. 129-135). The facts concerning Weinberg's activities with respect to Guccione recited in this congressional report and quoted extensively by petitioner in stating this case (Pet. 4-9), have never been subject to adversary testing or proven in a court of law.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO. 89-553

ROBERT C. GUCCIONE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

This case presents the important question whether the FBI can be held accountable for damages its operative caused during "ABSCAM" when that operative targeted and injured an innocent victim who refused to become involved in the illegal activity of the scam. Congress specifically condemned the government's handling of the operation and the harm it caused Petitioner Robert Guccione.

Petitioner submits this reply brief because, either unintentionally or by design, the United States has beclouded what is at issue in this case. Although it fairly states the "Question Presented," its brief hardly addresses that question at all.

The issue presented by this case is not whether Weinberg was technically an "employee of the Government" for purposes of the Federal

Tort Claims Act ["FTCA"].[1] Whether Weinberg was or was not an "employee," the case presents the question of whether the FBI's negligent supervision of him is actionable

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[1]Petitioner, citing the Department of Justice's own guidelines on the use of informants and confidential sources (Pet. 2), submits that Weinberg was not an employee of the government. The United States takes the position, in this Court, that Weinberg was a government employee. Neither the district court nor the Court of Appeals resolved this factual issue. It is not a question presented by this Petition and could not be resolved on this record.

The government disingenuously asserts that Petitioner's own pleadings establish that Weinberg was an employee of the government for purposes of the FTCA. (Brief in Opposition 6,8,9) They do no such thing. While Petitioner's complaint alleged that the FBI "employed or otherwise engaged Melvin Weinberg to assist in the [ABSCAM] investigation" (Compl. ¶5, C.A. App.9), the allegation did not purport to state a legal conclusion as to Weinberg's employment status under the FTCA. Rather, employing plain English, the complaint employed "employed" as a synonym for "used."

In any event the United States declines to mention that, in its own answer to the complaint, it expressly denied the allegation that the FBI "employed" Weinberg to assist in the investigation. (Answer ¶5, C.A. App. 17).

(footnote continued)

under the FTCA. Under either alternative, the case presents a question meeting the criteria for review by this Court.

Where the negligently-supervised intentional tortfeasor is not a government employee, it had long been settled that the intentional tort exception was no bar to suit, at least until the Second Circuit decided the instant case. This was the rule of Panella v. United States, 216 F.2d 622 (2d Cir. 1954), and its progeny, and Sheridan v. United States, 108 S.Ct. 2449 (1988), confirmed its

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(footnote continued from previous page)

The facts relating to Weinberg's peculiar relationship with the government are matters largely within the knowledge of the government, not the Petitioner. The precise status vis-a-vis the government of someone like Weinberg who acts as an informant and undercover operative cannot be determined without development of a full factual record through discovery and trial. In this case, the government resisted all discovery and, facing sanctions for non-compliance, moved for summary judgment. Summary judgment was granted, precluding development of the factual record.

correctness. The decision of the Second Circuit revisits Panella, rewrites it, and repudiates that rule. Given the patent conflict with Sheridan, this question itself is worthy of this Court's review.

Also worthy of review is the equally important, but more difficult question of when there is liability under the FTCA for negligent supervision by a federal employee of another government employee who commits an intentional tort. The government concedes that Sheridan v. United States, 108 S.Ct. 1449 (1988), leaves this important issue partially unresolved. It argues, however, that this case is an unsuitable vehicle for reaching that question because of the fact-bound disagreement between the parties concerning whether Weinberg was or was not a government employee for purposes of the FTCA. (Brief for the United States in Opposition at 6) This is

an incredible argument for the government to make to this Court in light of its other assertion that this case does not merit review because, on the basis of Petitioner's own pleadings, Weinberg must be deemed an employee of the government. It is also an argument which the government may not logically make because it is only if Weinberg is assumed to be a federal employee that any genuine question as to the government's immunity from suit arises.

Putting aside the obscuring rhetoric, this mixed case involving both intentional and negligent conduct squarely presents important questions which merit review by this Court, even on the government's assumption that Weinberg was a federal employee for purposes of the FTCA.

The broad question is under what circumstances there is liability under the FTCA for negligent supervision of a government employee who commits an intentional tort. Specifically, is a claim for negligent supervision barred under the intentional tort exception if the intentional tort is "work-related," as the Second Circuit has held.[2]

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[2]A typographical error in the first full paragraph of page 35 of the Petition renders Petitioner's argument on this point less clear than it should be. Petitioner argued that the Second Circuit erred in asking whether the intentional tort was "work-related" and ruling that suit was barred because Weinberg's acts were "work-related." Petitioner argues that, under Sheridan, no cause of action is barred by the intentional tort exception if the cause of action would not have been actionable under the general waiver of sovereign immunity. Thus, a suit arising out of the intentional tort of a non-employee is not barred by the intentional tort exception because such a claim would not be actionable under the FTCA's general waiver of immunity. Likewise, an intentional tort by an off-duty serviceman or an intentional tort by a government employee acting outside the scope of his employment are not within the intentional tort exception, because they are not within the general waiver of immunity; nothing in the FTCA could give

(footnote continued)

The case also presents the question whether the Second Circuit erred in holding that claims for negligent supervision by federal employees are not actionable because federal supervisory personnel owe no duty of care to persons who may be injured by those they are supposed to supervise.[3] On these questions,

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(footnote continued from previous page) rise to liability on the part of the government in those situations. The Petition should read:

> That [asking whether the intentional tort was "work-related"] is not an appropriate stand-in for employee/non-employee; on-duty/off-duty; or within-the-scope of employment/outside-the-scope of employment because it does not make the necessary distinction. It does not permit one to answer the question whether, putting aside the exception, the government would otherwise be liable for the tortious conduct.

Instead of reading "employee/non-employee" the petition, at page 35, erroneously read "employer/employee."

[3]Under the FTCA, duty of care is a question of state law. Petitioner submits that, under (footnote continued)

the government's brief in opposition simply reiterates the decision of the Court of Appeals, the decision as to which the Petitioner seeks review.

As demonstrated in the Petition for Certiorari, that decision is in conflict with this Court's recent ruling in Sheridan. Sheridan not only confirms the long-settled rule that the intentional tort exception has no applicability where the intentional tortfeasor is not a government employee. Sheridan also establishes that, where the intentional tortfeasor is a government employee, suit will not be barred under the intentional tort exception where, under the FTCA's general waiver of sovereign immunity, the intentional tortfeasor's acts would not have given rise to governmental liability.

(footnote continued from previous page) state law, the FBI did owe a special duty of care to Guccione. See 2 Restatement of the Law of Torts, 2d §§ 317, 321.

Where the intentional tortfeasor's act is the act of an off-duty serviceman, as in Sheridan, or is an act outside the scope of employment, then the intentional tort exception is no bar to suit.[4] Sheridan also expressly leaves open the question whether, in general, negligent supervision of a government employee is actionable under the FTCA.[5]

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[4]The government's repeated insistence that Petitioner himself has alleged that Weinberg was "under the control and supervision" of the FBI does not mean that Weinberg was acting within the scope of his employment. See, e.g., Rounds v. Delaware, Lackawanna & Western RR Co., 64 N.Y. 129 (1876); Oneta v. Paul Tocci, Co., 271 A.D. 681, 67 N.Y.S.2d 795 (1st Dept.), aff'd, 297 N.Y. 629, 75 N.E.2d 743 (1947). Those allegations were necessary components of Petitioner's claim that the negligence of Weinberg's supervisors was the cause of Petitioner's injuries.

[5]The government's attempt to distinguish the Ninth Circuit cases is misguided. Those cases stand for the proposition, rejected by the Second Circuit, that the intentional tort exception does not bar a suit against the United States based on the negligent supervision of an employee that proximately results in an intentional tort and injury to another. That the cases do not use precisely

(footnote continued)

The government boldly asserts that the Second Circuit's decision is consistent with the legislative history of the FTCA. Petitioner submits that it is not. Through the intentional tort exception, Congress intended to preserve sovereign immunity where the claimant attempts to impose liability on the government for an intentional tort, either directly or on the theory of respondeat superior. Congress, though, through enactment of the FTCA, affirmatively acted to waive government immunity where liability arises out of the negligence of government employees. This case is in the latter category.

In this specific case, Congress has expressed its concern about illegal conduct of an FBI operative, negligent mismanagement by the FBI, and the serious financial injury

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(footnote continued from previous page) the same language used in Petitioner's complaint does not undermine this basic point.

adamant refusal to commit illegal acts himself. This case is thus a particularly appropriate vehicle for resolving the legal questions it squarely presents.

CONCLUSION

Petitioner respectfully prays that the Writ of Certiorari be granted.

Respectfully submitted,

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